Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

DIANNA LAWSON, DAVID LAWSON, MICHELLE LAWSON and JUSTIN LAWSON,

Petitioners,

vs.

UNITED STATES OF AMERICA, CITY OF LORAIN, OHIO and LORAIN PORT AUTHORITY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER D. KUEBLER
Counsel of Record
O'BRYAN, BAUN AND COHEN, P.C.
Attorneys for Petitioners
401 Old South Woodward
Suite 320
Birmingham, Michigan 48009
(248) 258-6262

72245 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

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QUESTIONS PRESENTED FOR REVIEW

1. Did Congress intend to incorporate a discretionary function exception into the Suits in Admiralty Act; thus, does the Suits in Admiralty Act contain an implied discretionary function exception as interpolated from the Federal Tort Claims Act?

2. Does a decision which involves the number of warning lights to install on a fixed structure located on navigable waters implicate fundamental public policy and therefore constitute the type of discretion which Congress intended to protect pursuant to a discretionary function exception?

3. May a court interpolate a discretionary function exception from the Federal Tort Claims Act into the Suits in Admiralty Act without judicially legislating, where both enactments are mutually exclusive and such an implication is not necessary to prevent "second guessing" of fundamental policy decisions made by members of the executive branch?

4. Do municipal corporations and state political subdivisions such as port authorities have concurrent regulatory jurisdiction over structures on navigable waters within their territorial jurisdiction and thereby have authority — and owe a duty — to properly mark such structures in accordance and in compliance with the standards and procedures set forth in the federal aids to navigation regulations?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners/Plaintiffs Below:

Petitioner Dianna Lawson is an individual who suffered a catastrophic injury resulting in quadriplegia. Petitioner David Lawson is Dianna Lawson's husband. Petitioners Michelle Lawson and Justin Lawson are the natural children of Dianna Lawson and David Lawson who were minors at the time of the accident.

Respondents/Defendants Below:

Respondent United States of America is a sovereign nation. Respondent City of Lorain, Ohio is a municipality which is incorporated as such under the laws of the State of Ohio. Respondent Lorain Port Authority is a port authority which was established under the laws of the State of Ohio.

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Petitioners, Dianna Lawson, David Lawson, Michelle Lawson and Justin Lawson respectfully petition that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case which was entered on August 27, 1997. Concerning the Petitioners' claims against the United States, the Sixth Circuit has decided an important question of federal law that must be settled by this Court [implied discretionary function in the Suits in Admiralty Act], and that particular decision directly conflicts with a decision of the Fourth Circuit on the same important matter. Concerning the Petitioners' claims against the City of Lorain and Port Authority, the Sixth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court concerning concurrent safety jurisdiction which municipal corporations possess over navigable waterways.

The United States Court of Appeals for the Sixth Circuit has entered a decision in conflict with a decision of the United States Court of Appeals for the Fourth Circuit on the same important matter which concerns the discretionary function exception expressly set forth in the Federal Tort Claims Act and its judicial interpolation into the Suits in Admiralty Act. This topic involves an important question of federal law that has not been, but should be, settled by this Court.

The United States Court of Appeals for the Sixth Circuit has also decided an important federal question under Admiralty and Maritime law in a way that conflicts with relevant decisions of this Court regarding the existence and scope of a municipal corporation's duty concerning the safety of navigable waterways which are located within its territorial jurisdiction. In this context, the United States Court of Appeals for the Sixth Circuit has also so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers concerning the disregard of existing Supreme Court precedent on the subject of statutory construction.

The questions presented are important — the decision of the Sixth Circuit Court of Appeals will have an immediate and widespread impact beyond the perimeters of this case, involving Constitutional issues [separation of powers], statutory construction issues, issues regarding safety on navigable waters [marking man-made structures], and municipal authority and liability concerning maritime matters [concurrent federal and state jurisdiction, and federal supremacy and preemption issues].

OPINIONS BELOW

The *unreported* opinion of the Court of Appeals for the Sixth Circuit is reprinted in Appendix A at 1a-13a. The *unreported* opinion of the District Court for the Northern District of Ohio, Eastern Division is reprinted in Appendix B at 14a-24a. The two *unreported* Reports and Recommendations of the Magistrate are reprinted in Appendix C at 26a-44a and Appendix E at 47a-57a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 27, 1997. This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

The relevant statutes, ordinances and regulations involved in this case are cited as follows, the pertinent sections of which are reprinted verbatim in Appendix F at 58a-130a: U.S. Const., Art. III, § 2; 14 U.S.C. § 2; 14 U.S.C. § 81; 14 U.S.C. § 83; 14 U.S.C. § 85; 14 U.S.C. § 86; 28 U.S.C. § 1254; 28 U.S.C. § 1291; 28 U.S.C. § 1333; 28 U.S.C. § 1367; 28 U.S.C. § 2680; 33 U.S.C. § 401; 33 U.S.C. § 403; 33 U.S.C. § 565; 33 U.S.C. § 1221; 33 U.S.C. § 1225; 33 U.S.C. § 1311; 46 U.S.C. § 740; 46 U.S.C. § 742; 33 C.F.R. § 66.01-10(a); 33 C.F.R. § 67.01; 33 C.F.R.

§ 67.05-1; 33 C.F.R. § 67.05-05; 33 C.F.R. § 67.05-10; 33 C.F.R. § 67.05-20; O.R.C. § 721.04; O.R.C. § 2743.02; O.R.C. § 2744.01; O.R.C. § 2744.02; O.R.C. § 2744.03; O.R.C. § 2744.09; O.R.C. § 4582.01; O.R.C. § 4582.22; O.R.C. § 4582.30; Lorain Port Authority Code Chapters 185/187.

STATEMENT OF THE CASE

A. Factual Background

1. General Facts: The facts are as stated in the Sixth Circuit's opinion, with several exceptions. First, substantial probative evidence was presented that the westerly light was *not* working properly at the relevant time; *i.e.*, immediately prior to the allision while the Petitioners were attempting to navigate the waterway near the outer harbor breakwall. The allegation that the westerly light was not working properly is supported by the Coast Guard's own records which indicated that the light experienced repeated problems before and after the allision, including the failure to flash, thus displaying a solid white light signal such as that observed by David Lawson and Fred Rowe immediately before the allision.

Second, the Sixth Circuit erroneously found that the City and Port had no authority or control over the breakwall, despite the fact that federal regulations allow *joint* control over Aids to Navigation ["ATONS"] and both local governmental entities' assert authority over the harbor which encompasses the breakwall and the ATONS installed on the breakwall.

2. History Of The Suits In Admiralty Act: The language of the Suits in Admiralty Act does *not* support the proposition that Congress intended to incorporate a "discretionary function exception", by implication or otherwise. In 1920 when the Suits in Admiralty Act was passed, and in 1960 when the Act was amended, Congress did not incorporate a discretionary function exception. When the Federal Tort Claims Act was passed in 1948, Congress

did not modify or amend the Suits in Admiralty Act. The discretionary function exception judicially implied into the Suits in Admiralty Act is drawn from the Federal Tort Claims Act. However, the twenty-eight year gap of silence between the passage of the Suits in Admiralty Act and the passage of the Federal Tort Claims Act counsels against such an implication based on Congress' "intent". Moreover, the "private person" language contained in the 1960 Amendment, which *broadened* the Suits in Admiralty Act's waiver of sovereign immunity, was adopted twelve years *after* the Federal Tort Claims Act was passed.

The Congressional Record discloses that Congress intended to *broaden* the Suits in Admiralty Act's waiver of sovereign immunity under the 1960 Amendment, not restrict it by implied reference to the Federal Tort Claims Act. Instead, the Federal Tort Claims Act was left untouched and its own express language continues to preclude the application of its provisions to the Suits in Admiralty Act.

3. History Of The Breakwall's Construction: The City and Port worked intimately with the Army Corps of Engineers ["CORPS"] to complete the construction of the Breakwall. By local ordinance and regulation, the City and Port also maintain safety and criminal jurisdiction over the breakwall and the ATONS located thereon. The breakwall was built by the Corps with extensive involvement of the City and Port. The federal regulations allow the City and the Port to make application to mark the breakwall that resides within their territorial jurisdiction. Since the Corps built the breakwall with the assistance of the City and Port, they assumed a duty to adequately mark it with a sufficient number of lights.

4. Prior Accidents: The Respondents were aware of the hazards which the breakwall presented in its existing lighting configuration. At a minimum, five castrophic allisions occurred prior to Petitioners' casualty. The Respondents were on notice that

the breakwall was inadequately marked and should have taken the necessary steps to assure a safer harbor.

5. Problems With The Westerly Light: The ATON located on the west end of the breakwall had repeated problems both before and after the allision, including displaying a constant white light. This fact supported Petitioners' contention that the light was not working properly at the time of impact. The existence of the continuing problems provides proof of inadequate maintenance and repair. David Lawson and Fred Rowe testified that the light they observed immediately prior to impact was solid and this observation is consistent with the continuous problems documented in the government's own records. The evidence clearly suggested that the westerly light did not display a flash. Therefore, a genuine issue of material fact existed which should have precluded summary judgment.

The environment at the time of the allision comprised a black structure against a black background. It was nightime with substantial haze; there was no residual star light or moonlight; the moon had not arisen before the allision. The breakwall was essentially invisible in the area of the impact [middle]. Additional lights were needed to adequately warn mariners of the breakwall's precise location, not merely its general existence.

B. Proceedings Below

As this matter seeks review of the judgment of the United States Court of Appeals for the Sixth Circuit, the basis of federal jurisdiction in the court of first instance was predicated upon the following: (1) 28 U.S.C. § 1331 [federal question involving the Suits in Admiralty Act, 46 U.S.C. § 742]; (2) 28 U.S.C. § 1333 [admiralty/maritime], and; (3) 28 U.S.C. § 1367 [supplemental jurisdiction over pendant and/or ancillary state-based claims].

Plaintiffs-Petitioners Dianna, David, Michelle and Justin

Lawson ["Petitioners"] commenced this action against Respondent United States of America ["U.S.A."] under the Suits in Admiralty Act, Title 46 U.S.C. § 741, *et seq.*, in the Northern District of Ohio, Eastern Division. Petitioners also alleged supplemental jurisdiction against Respondent City of Lorain ["City"] and Respondent Lorain Port Authority ["Port"]. Petitioners alleged that the outer harbor breakwall at the mouth of the Black River in the Port of Lorain, Ohio, was inadequately marked and that the failure to install additional white lights on the structure's horizontal plane caused an allision between the structure and the Petitioner's small pleasure boat which resulted in a quadraplegic injury. Petitioners claimed that the U.S.A., Port Authority and City all had responsibility for installing additional lights to adequately mark a known hazard.

The U.S.A. filed its Motion to Dismiss for lack of subject matter jurisdiction, primarily arguing that the District Court was precluded from hearing the Petitioners' claim due to the discretionary function exception to the waiver of sovereign immunity which was implied into the Suits in Admiralty by judicial construction.

The Petitioners subsequently filed an Amended Complaint to incorporate additional facts concerning the U.S.A.'s alleged culpability for the allision. The Port filed its Motion for Summary Judgment, arguing that it owed no duty to mark the structure involved in this pleasure boat casualty with additional navigational aids. On November 26, 1991, the Magistrate recommended that the U.S.A.'s Motion to Dismiss be granted in part, excepting two portions of the First Amended Complaint.

The U.S.A. then filed a second Motion for Summary Judgment on the remaining claims that had not been dismissed. The City followed by filing its Motion for Summary Judgment, arguing as the Port did, that it owed no duty to make application to mark the structure. On March 25, 1994, the Magistrate recommended that all Motions for Summary Judgment be granted.

On April 30, 1996, the District Court granted the U.S.A.'s Motion to Dismiss and all Motions for Summary Judgment, disposing of all issues raised by the Petitioners. Judgment was entered on April 30, 1996. The Petitioners timely filed their Notice of Appeal on June 25, 1996. Oral arguments were heard on the merits of the appeal on June 13, 1997 and the Sixth Circuit's decision, which upheld the lower court's rulings, was entered on August 27, 1997.

REASONS FOR GRANTING THE WRIT

A. The Decision Of The Court Of Appeals For The Sixth Circuit Conflicts With The Decision Of The United States Court Of Appeals For the Fourth Circuit On The Issue Of Whether The Discretionary Function Exception To The Federal Tort Claims Act Is Implied Into The Suits In Admiralty Act, And With The Second And Ninth Circuit Court Of Appeals On The Issue Of Whether, Even If The Discretionary Function Exception Is Impliedly Incorporated, The Type Of Conduct At Issue Herein Involves The Type Of Fundamental Public Policy Which Congress Intended To Protect.

The decision of the Sixth Circuit Court is unconstitutional on its face: it invades the province of Congress and violates the separation of powers doctrine by impliedly incorporating a discretionary function exception into a statute whose language does not fairly allow such incorporation. The Sixth Circuit has engaged in judicial legislation under the guise of statutory construction, as have other appellate courts who have implied an exception into the Suits in Admiralty Act.

The Suits in Admiralty Act does not contain an implied discretionary function exception for acts which private persons may perform. The judiciary's importation of the Federal Tort Claims

Act's exception into the Suits in Admiralty Act amounts to an unconstitutional usurpation of the legislative domain.

Alternatively, the Fourth Circuit has correctly determined that this approach is improper, thus resulting in a conflict among two Circuit Courts. This Court must resolve the conflict in accordance with the Fourth Circuit's decision and reverse the Sixth Circuit's decision because it undermines maritime law and the fundamental concept of separation of powers.

I. PROHIBITING AN IMPLIED DISCRETIONARY FUNCTION EXCEPTION

The Suits in Admiralty Act *prohibits* the implied incorporation of the discretionary function exception contained in the Federal Tort Claims Act. *Eastern Transportation Company v. United States*, 272 U.S. 675, 47 S. Ct. 289, 71 L. Ed. 472 (1927), one of the earliest cases interpreting the Suits in Admiralty Act, and one of the few such cases reviewed by this Court, never referenced a discretionary function exception.

Title 46 U.S.C.A. § 742 was enacted on March 9, 1920, twenty-eight years before the Federal Tort Claims Act was enacted on June 14, 1948. In the interval, Congress never indicated any intent to incorporate a discretionary function exception into the Suits in Admiralty Act. On September 13, 1960, the Suits in Admiralty Act was amended to provide for a "libel *in personam*" against the United States in Admiralty:

> In cases where ... if a ***private person*** ... were involved, a proceeding in admiralty could be maintained, any ... proceeding in personam may be brought against the United States.

[Emphasis supplied].

Section 2 of the original Act, 41 Stat. 525, did *not* reference "private person involvement". However, the 1960 Amendment expanded the already broad waiver of sovereign immunity by allowing an admiralty suit against the United States under circumstances where a private person would be subject to liability. As a consequence of the 1960 Amendment, if a private person owes a duty and is exposed to liability for engaging in a certain activity, the U.S.A. also owes a duty and waives its immunity against liability arising from engaging in a similar activity. The Sixth Circuit ignores this key statutory language.

Title 28 U.S.C.A. § 2680(a) provides an express discretionary function exception. The Suits in Admiralty Act lived for twenty-eight years without the incorporation of a similar discretionary function exception by legislative action or judicial *fiat*. Obviously, the exception was deemed unneeded.

The Sixth Circuit's decision directly conflicts with the Fourth Circuit in *Lane v. United States*, 529 F.2d 175 (4th Cir. 1975). *Lane* correctly analyzed the issue and properly determined that the discretionary function exception set forth in § 2860(a) is *not* implied into the Suits in Admiralty Act:

> This action, however, is brought not under the Tort Claims Act but under the Suits in Admiralty Act. 46 U.S.C.A. § 742 was amended in 1960 to subject the United States to libels *in personam*, not just when a government owned vessel or cargo was involved *but in every situation in which, if a private person were involved, a proceeding in admiralty could be maintained. It contains no discretionary function exception*, and the Tort Claims Act contains a *specific exception* of claims for which the Suits in Admiralty Act provides a remedy.

Id. at 179.

> *There is no basis upon which we can import the many exceptions in the Tort Claims Act into the Suits in Admiralty Act, where the United States is to be held accountable in admiralty whenever a private person, in similar circumstances, would be.*

[Emphasis supplied].

De Bardeleben Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971) highlighted the intent of the 1960 Amendment; it was meant to effect a "*substantial broadening*" of liability for maritime claims. In rejecting a restrictive interpretation of the Act, *De Bardeleben* recognized the beneficent approach of maritime jurisprudence which is not found in the Federal Tort Claims Act, a statute which incorporates the more draconian jurisprudence of the common law:

> We reject these contentions. The words of the statute, its legislative history, the liberal approach in interpreting waivers of immunity, and the senseless absurdities which would result belie the narrow reading of that which the Government would give to the new (1960) Section 2 of SIA. If one were bringing an action against a private cartographer for maritime injuries from the negligent publication of a marine chart, he could bring "a proceeding in admiralty," 46 U.S.C.A. § 742. And the case certainly satisfies the requirement that "if a private person . . . were involved," the claimant could proceed in admiralty and a private cartographer would at least be exposed to potential liability.

Id. at 145.

De Bardeleben further stated:

> . . . § 742 by its own terms disavows governmental immunity in admiralty actions against the United States.
>
> More positively, the legislative history shows that . . . [i]t was to *assimilate the Government to the private person in relation to any or all transactions giving rise to liability in the Admiralty. . . . Reimportation of FTCA provisions or exceptions produces obviously unintended and irrational distinctions*

[Emphasis supplied]. *Id.* at 145-146.

A private person [including a municipal corporation] is permitted to make application to establish more lights than those established by the U.S.A. Title 14 U.S.C.A. § 83 and 33 C.F.R. Parts 62/66/67. Specifically, Section 67.05-2 provides:

> The obstruction lighting requirements prescribed in this part are the *MINIMUM REQUIREMENTS ONLY AND SHALL NOT PRECLUDE THE MAINTAINER FROM MAKING APPLICATION FOR AUTHORIZATION TO ESTABLISH MORE LIGHTS, OR LIGHTS OF GREATER INTENSITY* than required to be visible at the distances prescribed; *Provided*, That the prescribed characteristics of *COLOR* and flash duration are adhered to.

[Emphasis supplied].

A private party owes a duty to properly mark and can be held liable for failure to adequately mark a structure on navigable waters. *See, e.g., Cumberland County Utilities Authority v. The M/T Delbar, Etc., et al.*, 1984 A.M.C. 1856 (D. N.J. 1984); *Corby v. Ramsdell*, 48 F.2d 701 (2nd Cir. 1931); *Plantation Pipe Line Company v. Findlay Towing Company, Inc.*, 1977 A.M.C. 2553 (S.D. Ala. 1977);

Kelly Island Lime and Transport Co. v. City of Cleveland, 47 F. Supp. 533 (N.D. Ohio E.D. 1942); *Reading Company v. Pope & Talbot, Inc.*, 192 F. Supp. 663 (E.D. Pa. 1961), *aff'd per curiam*, 295 F.2d 40 (3rd Cir. 1961). Under the express language of the Suits in Admiralty Act, the U.S.A. can also be held liable; sovereign immunity is waived.

II. LACK OF DISCRETION IN THIS CASE

The Sixth Circuit's opinion[1] infers that the numbers decision [concerning safety markers/warnings] involves the type of decision-making that Congress intended to protect via a discretionary function exception. This opinion conflicts with the Second, Fifth and Ninth Circuits. The decision not to install more lights essentially involves the warning of a structure's precise "location", as opposed to its mere general "existence". Here, the numbers decision was based upon nothing more than a perceived lack of need for additional warning lights, as opposed to balancing any fundamental policy choices.

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1. In this case as well as in *Graves v. United States*, 872 F.2d 133 (6th Cir. 1989) and *In re Ohio River Disaster Litigation*, 862 F.2d 1237 (6th Cir. 1988). The discretionary function exception does not prevent "second guessing" of all governmental decision-making. However, that is the clear — albeit erroneous — consequence of the Sixth Circuit's holding. The discretionary function exception is not concerned with the mere circumstance of decision-making. The exception focuses upon the "***nature/character***" of the decision-making involved because that is what implicates the separation of powers issue which forms the rationale for the exception in the first instance. Courts may intrude on decision-making which is not "fundamental" in character. The Sixth Circuit loses sight of this key distinction and appears to sweep all governmental decisions into the exception's dragnet. By doing so, the Sixth Circuit clearly disregards the teachings of *United States v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988), and *United States v. S.A. Empresa de Viacao Aero Rio Grandense [Varig Airlines]*, 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984).

The mere showing that some choice is involved in the decision-making process is not sufficient to activate the discretionary function exception. Balancing important policy considerations is a prerequisite; the competing policy decisions that were purportedly involved in this case, simply by deciding the number of lights to install, were never established. "The discretionary function exception protects only activities which, because they further policy goals, are uniquely governmental." *Raymond v. United States*, 923 F. Supp. 1419 (D. Kan. 1996); *Gonzalez v. United States*, 690 F. Supp. 251 (S.D. N.Y. 1988); *Miller v. United States*, 710 F.2d 656 (10th Cir. 1983).

In *Eklof Marine Corp. v. United States*, 762 F.2d 200 (2nd Cir. 1985), the Second Circuit held that the U.S.A.'s decision regarding the ***number*** of ATONS is one which merely implements the policy adopted and therefore it is not the type of decision which Congress intended to protect:

> The district court held, however, that the Coast Guard, as a matter of law, cannot be held liable for failing to act in *placing additional aids to navigation* in the vicinity of Diamond Reef and that, absent abuse of discretion, the decision to place the Diamond Reef bouy at its present location is unreviewable. *We disagree.*

[Emphasis supplied]. *Id.* at 202. Obviously, *Eklof* did not consider the *numbers* decision to be of the caliber that Congress intended to protect:

> [T]he Coast Guard, having undertaken to mark a hazard, is equally duty-bound to provide *sufficient aids* to mark the obstruction adequately and that the failure to do so also may result in liability. It is the marine obstruction that creates the initial danger. That danger defines the *scope* of the Coast Guard's duty once the

> Coast Guard acts to mark it. For the purpose of determining whether that duty has been breached, the questions of whether the bouy was mispositioned or whether *more bouys were necessary* to adequately to mark the obstruction are questions of fact for the trial court to decide.
>
> * * *
>
> When the Coast Guard acted to mark the obstruction, it was required to do whatever was reasonably necessary, *including deploying additional bouys*, to mark it adequately.

[Emphasis supplied]. *Id.* at 203. The decision regarding light "numbers", as opposed to light "characteristics", is reviewable by a court. *Id.* at 205.

The Ninth Circuit concurred with the foregoing in *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994). *Sutton* concluded that a navigation marking/light is nothing more than a safety device which acts as a warning of a structure's specific location on navigable waters. *Sutton* concluded that:

> [t]he failure to illuminate Oscar 8 does not fall within the discretionary function exception for the same reasons that the failure to post a speed limit adequately was without the exception: the omission amounted to a failure to warn of an obstruction to navigation that the Navy had placed in navigable waters. *The decision not to illuminate the buoy was not of a kind involving social, economic, or political policy.*

[Emphasis supplied]. *Id.* at 911.

Sutton held that the U.S.A.'s failure to adequately illuminate mooring buoys did *not* involve protected discretion:

> This conclusion, however, does *not* imply that the Navy cannot be held liable for its failure to mark an obstruction that *it placed in navigable waters.* Congress has granted the Coast Guard broad authority to scan the navigable waters of the United States and to mark *any* obstructions to make those waters safer for navigation, *regardless of whether that obstruction was placed by the United States, is a natural obstruction, or was placed by private entities.*
>
> * * *
>
> *The decision of the Navy not to warn boaters of an obstruction to navigation that the Navy itself placed in navigable waters that the Navy knew to be traversed by pleasure boat traffic, on the other hand, is much narrower and, as we concluded above, is not a decision of the type Congress intended to shield from liability.*

[Emphasis supplied]. *Id.* at 911. This Court, in *Gaubert, supra,* recognized what *Sutton* concluded — not all discretionary decisions are protected:

> There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish.

Id. 111 S. Ct. at 1275, n.7.

In *Faber v. United States,* 56 F.3d 1122, 1124-1125 (9th Cir.

1995), the Ninth Circuit also cogently determined that safety/ warning decisions are *not* related to broad public policy:

> [T]he question of what constitutes adequate warning is *not* typically related to broad public policy. To the contrary, the typical case in which the government is sued for a failure to warn is like *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990) where the government was not shielded from liability for the ... *failure to provide adequate warnings*. [Such] conduct *was not related to a matter of broad public policy*.

[Emphasis supplied].

The U.S.A.'s potential liability for failure to provide an adequate warning is akin to a private person's liability for such a failure, which is not protected by the Suits in Admiralty Act. *Faber* recognized this principle as follows:

> [T]he conduct was the same as that of a *private citizen* who fails to take proper action to ensure the *safety* of visitors on its property and is thereby liable for negligence.

[Emphasis supplied]. *Id.* at 1125. *Smith v. United States*, 383 F. Supp. 1076 (D. Wyo. 1974), *aff'd*, 546 F.2d 872 (10th Cir. 1976); *American Exchange Bank v. United States*, 257 F.2d 938 (7th Cir. 1958); *Callas v. United States*, 682 F.2d 613 (7th Cir. 1982); *Seyler v. United States*, 832 F.2d 120, 123 (9th Cir. 1987) ["we doubt that any decision not to provide adequate warning signs would be of the nature and quality that Congress intended to shield from tort liability"].

Where the challenged governmental activity involves *safety* considerations under an *established* policy, rather than the balancing

of competing policy considerations to *formulate* a safety policy, as existed here, the rationale for the implied discretionary function exception evaporates. *Aslakson v. United States*, 790 F.2d 688, 693 (8th Cir. 1986); *ARA Leisure Services v. United States*, 831 F.2d 193, 195 (9th Cir. 1987). *Faber* summed up this principle in the following language:

> [A] failure to warn involves considerations of *safety*, *not* public policy. It would be wrong to apply the discretionary function exception in a case where a low-level government employee made a judgment not to post a warning sign. . . . Such a judgment would be no different than a judgment made by a *private individual* not to take certain measures to ensure the safety of visitors. To interpret such a judgment as discretionary would be too expansive an interpretation of Congress' intent in creating the discretionary function exception. Therefore, in cases where the government has allegedly failed to warn, the use of the discretionary function exception must be *limited* to those *unusual* situations where the government was required to engage in *broad*, policy-making activities or to consider *unique* social, economic, and political circumstances in the course of making judgments related to safety.

[Emphasis supplied]. *Id.* at 1125.

Sutton, *supra*, concurred with *Faber*:

> [A] *decision not to warn* of a specific, known hazard for which the acting agency is responsible is *not the kind of broader social, economic or political policy decision that the discretionary function exception is intended to protect.*

[Emphasis supplied]. *Id.* at 910.

Summers v. United States, 894 F.2d 325 (9th Cir. 1990), *amended*, 905 F.2d 1212 (9th Cir. 1990), reached the identical conclusion:

> As we indicated in *Lingren v. United States*, 665 F.2d 978 (9th Cir. 1982), a governmental failure to warn is not necessarily shielded from suit simply because a discretionary function is in some way involved. On the contrary, we have concluded that "where the challenged governmental activity involves safety considerations under an established policy, rather than the balancing of competing policy considerations, the rationale for the exception falls away and the U.S. will be responsible for the negligence of its employees." *ARA Leisure Services v. United States*, 831 F.2d 193, 195 (9th Cir. 1987) [quoting *Aslakson v. United States*, 790 F.2d 688, 693 (8th Cir. 1986)].

Id. at 1215-1216.

Sheridan Transp. Co. v. United States, 897 F.2d 795, 798 (5th Cir. 1990) also concluded that inadequate warnings arising from the discharge of a regulation is not protected:

> We are aware of no consideration of public policy which is involved in a decision to place a wreck buoy in a position where it does not indicate the location of the wreck it purportedly marks without providing notice of that fact.

Id. at 798. *See also Alabama Electric Cooperative, Inc. v. United States*, 769 F.2d 1523 (11th Cir. 1985); *Madison v. United States*, 679 F.2d 736 (8th Cir. 1982); *Parker Land and Cattle Co., Inc. v. United States*, 796 F. Supp. 477 (D. Wyo. 1992); *Noel v. United States*, 893 F. Supp. 1410, 1420 (N.D. Cal. 1995).

As in *Faber, supra*, "nothing in Petitioners' claim distinguishes it from an ordinary tort claim against a *private individual* who has failed to adequately warn of dangers associated with the location of a man-made structure on navigable waters." *See also Boyd v. United States*, 881 F.2d 895 (10th Cir. 1989); *Drake Towing Co. v. Meisner Marine Constr. Co.*, 765 F.2d 1060 (11th Cir. 1985), *rehearing denied en banc*, 773 F.2d 1239 (1985), *rehearing en banc*, 773 F.2d 1239 (11th Cir. 1985).

III. VIOLATION OF STATUTORY CONSTRUCTION PRINCIPLES

Most glaringly, the Federal Tort Claims Act itself expressly prohibits incorporation of its provisions — including the discretionary function exception — into the Suits in Admiralty Act. Therefore, it is a "senseless absurdity" to engraft a discretionary function exception into the Suits in Admiralty Act using the Federal Tort Claims Act as the template. Title 28 U.S.C.A. § 2680(d) provides in relevant part:

> The provisions of this chapter *shall not apply* to . . . (d) any claim for which a remedy is provided by §§ 741-752 . . . of Title 46.

[Emphasis supplied].

This Court must examine the efficacy of this judicially created fiction which has no legal foundation for its precedent. Engrafting a concept that was alien when the Suits in Admiralty Act was enacted, ignored when the Federal Tort Claims Act was passed, and never adopted when the Suits in Admiralty Act was amended, perverts the key principles of statutory construction.

Petitioners acknowledge that the discretionary function exception is grounded on the separation of powers doctrine. *Owen v. City of Independence*, 445 U.S. 622, 648, 100 S. Ct. 1398, 1414,

63 L. Ed. 2d 673 (1980), *reh. denied*, 446 U.S. 993, 100 S. Ct. 2979, 64 L. Ed. 2d 850 (1980). However, no matter what prism 28 U.S.C. § 2680(a) is viewed through, it cannot be argued that Congress intended to incorporate that particular provision into the Suits in Admiralty Act. Engrafting such an exception into the Suits in Admiralty Act "second guesses" Congress and itself violates the separation of powers doctrine.

The Sixth Circuit's decision ignores the "private person" clause, disregards 28 U.S.C. § 2680[d], and interferes with the broad waiver of sovereign immunity effectuated by the 1960 Amendment. The "private person" language provides the safety net which avoids second guessing of fundamental public policy decisions. This Court must refrain from second-guessing Congress by implying an unintended and unnecessary exception into the Suits in Admiralty Act.

As a result of the constitutional provisions which distribute the powers of the government, courts have no legislative authority and must scrupulously avoid encroaching on legislative powers. *Ebert v. Posten*, 266 U.S. 548, 554, 45 S. Ct. 188, 69 L. Ed. 435 (1924); *Holden v. Stratton*, 198 U.S. 202, 210, 25 S. Ct. 656, 49 L. Ed. 1018 (1905). Therefore, the judiciary may not, under the guise of construction, legislate by amending, extending or otherwise creating a statutory provision alien to the clear language of that which has been enacted by the legislature, whether done by implication, interpretation or interpolation. *Matson Navigation Co. v. United States*, 284 U.S. 352, 356, 52 S. Ct. 162, 76 L. Ed. 336 (1931); *Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 329-330, 47 S. Ct. 368, 71 L. Ed. 663 (1926); *Employers Liability Cases*, 207 U.S. 463, 500-501, 28 S. Ct. 141, 52 L. Ed. 297 (1907).

Moreover, a court may not by implication read into a statute that which is not intended to be there or make an implication which the language of the statute does not warrant. *Gould v. Gould*, 245 U.S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211 (1917). When terms of

the statute are clear and unambiguous, judicial inquiry is complete. *United States v. James*, 478 U.S. 597, 606, 106 S. Ct. 3116, 92 L. Ed. 483 (1986); *Consumer Products Safety Commission v. G.T.E. Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1978).

Courts have no authority to create via construction, and must not create, limitations or exceptions to the provisions of a statute which is not suggested by any of its express and unambiguous terms or is not within the manifest intent of Congress as gathered from the express language of the statute itself. *United States v. Morgan*, 222 U.S. 274, 281-282, 32 S. Ct. 81, 56 L. Ed. 198 (1911); *Bull v. United States*, 295 U.S. 247, 55 S. Ct. 695, 79 L. Ed. 1421 (1936); *Flynn v. New York, N.H., & H. R. Co.*, 283 U.S. 53, 51 S. Ct. 357, 75 L. Ed. 837 (1931); *Louisville & N.R. Co. v. Mottley*, 219 U.S. 467, 474, 31 S. Ct. 265, 55 L. Ed. 297 (1911); *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518, 46 S. Ct. 619, 70 L. Ed. 1059 (1925).

Courts also may not, via construction, insert phrases in a statute which have been omitted by Congress, or supply a *casus omissus* by adding language to the statute about which nothing whatsoever was said and which, to all appearances, was not in the mind of Congress at the time the statute was enacted. *Folsom v. United States*, 160 U.S. 121, 127, 16 S. Ct. 222, 40 L. Ed. 363 (1895); *United States v. Temple*, 105 S. Ct. 97, 98-99, 26 L. Ed. 967 (1881); *United States v. Monia*, 317 U.S 424, 63 S. Ct. 409, 87 L. Ed. 376 (1944); *Iselin v. United States*, 270 U.S. 245, 250-251, 46 S. Ct. 248, 70 L. Ed. 566 (1926). These principles are especially true where, as here, Congress expressly stated that the Suits in Admiralty Act and the Federal Tort Claims Act are mutually exclusive.

This Court must exercise great wariness in the construction of a statute where the meaning is sought to be derived not from the specific language of the act under review, but from innuendoes taken from disjointed portions of another statute. *Palmer v. Massachusetts*, 308 U.S. 79, 83, 60 S. Ct. 34, 84 L. Ed. 93 (1939).

As this Court stated in *Rayonier, Inc. v. United States*, 352 U.S. 315, 320, 77 S. Ct. 374, 379, 1 L. Ed. 2d 354 (1957):

> There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.

The Sixth Circuit's decision violates the fundamental principle that a new provision simply may not be interpolated in a statute or ingrafted thereon. *United States v. Cooper Corp.*, 312 U.S. 600, 61 S. Ct. 742, 85 L. Ed. 1071 (1941). Without exception, the overwhelming and controlling precedent emanating from this Court prohibits that which the Sixth Circuit has done.

More recently, in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) this Court stated its repugnance to activist jurisprudence and counsels against implying legal consequences when the plain language and meaning of the statute do not warrant such activism:

> We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.

Id. at 521, citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). *Id.*, at 505 U.S. page 521.

The sapient words of Justice Stewart in *United States v. United Continental Tuna*, 425 U.S. 164, 96 S. Ct. 1319, 47 L. Ed. 2d 653 (1975) must be heeded:

> When there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from

> the plain meaning of words . . . in search of an intention which the words themselves did not suggest.

[citing *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96, 5 L. Ed. 37 (1829)]. *Id.* at 425 U.S. page 184.

The plain language of the Suits in Admiralty Act and the Federal Tort Claims Act preclude any implication. As Justice Stevens stated at 505 U.S. page 522, "there is no good reason to believe that Congress meant less than what it said" when it amended the Suits in Admiralty Act to waive sovereign immunity in situations when a private person, under similar circumstances, could be sued in admiralty. Because private persons can select the number of light ATONS pursuant to 33 C.F.R. Part 67, Congress clearly contemplated a suit in admiralty against the U.S.A. for failure to install a sufficient number of lights on a man-made structure located on navigable waters which presented a hazard to navigation when not adequately marked. The "second guessing" issue does not encompass the type of discretionary decisions which private persons are allowed to make.

Ultimately, the Sixth Circuit's decision improperly expands the perimeters of an implied exception and ignores the much broader waiver of sovereign immunity effectuated by the Suits in Admiralty Act, which waiver is *not* found with equal liberality in the Federal Tort Claims Act.[2] *Grillea v. United States*, 229 F.2d 687 (2nd Cir. 1956), *rehearing en banc*, 232 F.2d 919 (2nd Cir. 1956):

> We are to remember that the Suits in Admiralty Act is *not* to be construed with the same jealousy that ordinarily circumscribes the consent of the United States to be sued.

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2. This liberality is best expressed in this Court's pronouncement in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 281- 282, 100 S. Ct. 1673, 64 L. Ed. 2d 284 (1980): "it is better to grant than withhold remedies" under the maritime law.

[Emphasis supplied]. *Id.* at 921. Accord: *Nahmek v. United States*, 267 U.S. 122, 45 S. Ct. 277, 69 L. Ed. 536 (1925); *Eastern Transportation Company v. United States, supra*; *Canadian Aviator Ltd. v. United States*, 324 U.S. 215, 65 S. Ct. 639, 89 L. Ed. 901 (1945). *Gulf Oil v. Panama Canal Co.*, 269 F. Supp. 793 (D. C.Z. 1969), *rev'd*, 407 F.2d 24, 28-29 (5th Cir. 1969). This Court recognized waiver in *American Stevedores v. Porello*, 330 U.S. 446, 67 S. Ct. 847, 91 L. Ed. 1011 (1947):

> The passage of the Suits in Admiralty Act . . . attests to the growing feeling of Congress that the United States should put aside its sovereign armor. . . .

Id. at 330 U.S. page 453. *See also United States v. Muniz*, 374 U.S. 150, 83 S. Ct. 1850, 10 L. Ed. 2d 805 (1962); *Smith v. United States*, 383 F. Supp. 1076 (D. Wyo. 1974), *aff'd*, 546 F.2d 872 (10th Cir. 1976). *Weiss v. United States*, 168 F. Supp. 300 (D.C. N.J. 1958).

The Sixth Circuit's decision is an anachronism which does not comport with Congress' intent, violates the separation of powers doctrine via judicial legislation, and it is totally unnecessary to prevent second-guessing of fundamental policy decisions of the executive branch. It perpetuates a legal anomaly which should be pruned from this nation's maritime jurisprudence.

B. The Decision Of The Court Of Appeals For The Sixth Circuit Is In Direct Conflict With Legal Precedent Concerning The Powers, Responsibilities And Liability Of Municipal Corporations In The Field Of Maritime Safety Matters And Ignores Federal Regulations Which Govern Aids To Navigation On Structures Located Within Municipal Corporations' Territorial Jurisdiction.

The Sixth Circuit's decision regarding the Port's and City's culpability contradicts existing Supreme Court precedent

concerning municipal liability for maritime torts. Under existing precedent, local governments have *concurrent* jurisdiction over territorial navigable waters and may regulate maritime affairs so long as such regulation complies with and/or does not conflict with federal regulations.

Although this Court in *Gibbons v. Ogden* 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1924) established the proposition that the federal government maintains the paramount right to regulate navigable waters, this Court has also maintained for more than one hundred years that state and local governments may enact reasonable regulations and take other action affecting navigable waters located within their respective boarders so long as Congress' power to regulate commerce is not *unreasonably* infringed upon. *Mobile County v. Kimball*, 102 U.S. 691 (1881). For example, states may make improvements to navigable waters. *Muse v. Glover*, 119 U.S. 543, 553, 7 S. Ct. 313, 30 L. Ed. 487 (1886). *See also Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299, 13 L. Ed. 996 (1851); *Willson v. The Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 27 L. Ed. 411 (1829); *The James Gray v. The John Fraser*, 62 U.S. 184, 16 L. Ed. 106 (1858).

These principles hold true in modern times. *See, e.g., Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960); *Yamaha Motor Corp v. Calhoun*, __ U.S. __, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984); *Bass River Associates v. Mayor of Bass River Township*, 743 F.2d 159 (3rd Cir. 1984). Nevertheless, the Sixth Circuit disagrees.

The Sixth Circuit's opinion conflicts with prior decisions of this Court and other Circuit Courts, all of which conclude that the general maritime law provides wide latitude to local governments to exercise police powers over structures located on navigable waters under the "maritime but local" doctrine. *See, e.g., Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S. Ct. 988, 55 L. Ed. 2d

179 (1978); *Anderson v. Pacific S.S. Co.*, 225 U.S. 187, 32 S. Ct. 626, 56 L. Ed. 2d 1047 (1912); *Beveridge v. Lewis*, 939 F.2d 859 (9th Cir. 1991).

The Sixth Circuit also erroneously concluded that the U.S.A. had "exclusive" control over the breakwall. It held that the Port and City owed no duty to mark the breakwall because neither entity "controlled" the structure; *i.e.*, they had no authority to mark the breakwall. To the contrary, although the federal government possesses primary and paramount jurisdiction over the breakwall, it does *not* have *exclusive* jurisdiction over the ATONS. 33 C.F.R. § 66.01-1 contemplates that a "*public body*", such as the Port and City, may establish and maintain "private" ATONS and may *mix* them with federal ATONS on a federal structure.

The U.S.A.'s own guidelines provide that federal *and* "private" ATONS may be installed on the *same* structure even if the United States of America owns or controls the structure, thus acknowledging the existence of *concurrent* jurisdiction over ATONS. The Sixth Circuit disregarded these principles. Further, the Port's own regulations *assumed* authority over ATONS located within Lorain Harbor. Section 185.23 provides:

> No person shall . . . damage or destroy any . . . *aids to navigation or lights*. . . .

[Emphasis supplied].

Part 67 of 33 C.F.R. treats the Port and City as "private" maintainers, and it permits both entities to install ATONS on the breakwall upon proper application. Accordingly, both the City and the Port are subject to liability under O.R.C. § 721.04, the Ports and Waterways Safety Act and the General Maritime Law. *Workman v. New York City*, 179 U.S. 552, 21 S. Ct. 212, 45 L. Ed. 314 (1900); *See also Central Rivers Towing, Inc. v. City of Beardstown, Illinois*, 750 F.2d 565 (7th Cir. 1984).

O.R.C. § 721.04 and O.R.C. § 4582.31(J) delegate the power of the State of Ohio to riparian municipal corporations and port authorities to "lease the right to operate works in aid to navigation". Here, the Port and City did absolutely nothing to "*lease the right*" [*i.e.*, make application pursuant to 33 C.F.R. Parts 66/67] to operate additional ATONS on the breakwall, although they had authority to do so under **federal** regulations, and their *scienter* of a serious hazard imposed a duty to do so.

Moreover, Title 33 U.S.C.A. § 1225 ["Ports and Waterways Safety Act"], does not prohibit State action:

> (b) State law. Nothing contained in this section, with respect to structures, prohibits a State or *political subdivision thereof* from prescribing *higher . . . safety standards. . . .*

[Emphasis Supplied]. The Sixth Circuit disregarded this enactment as well.

The Port and the City are not precluded from applying to the Coast Guard to mark the breakwall; the U.S.A.'s own regulation permits both to do so. The only issue was whether the duty required either to do so, which duty is defined by the foreseeability of the risk of an improperly marked structure. The City and Port had the authority to mark. Since they were both aware of prior casualties involving the breakwall, a duty indeed existed. *See Woodford v. Carolina Power & Light Company*, 779 F. Supp. 827 (E.D. N.C. Raleigh Div. 1991), reasoned:

> *Slater v. Texaco, Inc.*, 506 F. Supp. 1099 (D. Del., 1981). In *Slater*, the court stated that "[u]nder the English common law of admiralty . . . [f]ailure to mark an obstruction constitutes negligence . . ." Id., at 1110. Likewise, the American common law of admiralty follows this principle. *Casement v. Brown*, 148 U.S.

> 615, 13 S. Ct. 672, 37 L. Ed. 582 (1893); *Arabian American Oil Co. v. Hellenic Lines, Ltd.*, 633 F. Supp. 659 (S.D. N.Y., 1986), . . .

Id. at 830.

The Port and City were not prevented from marking the breakwall because the Code of Federal Regulations expressly permits *joint* marking upon proper application. Thus, the Sixth Circuit's rejection of the nuisance and negligence claims on the basis that no duty existed conflicts with long-standing precedent. Joint marking, *not* "exclusivity", is contemplated by the federal government's own regulations.

The Sixth Circuit's parting remark — that had the Port and City attempted to mark the breakwall they would have been subject to criminal sanctions — is completely off course. To the contrary, neither the Port or the City could be found criminally culpable for attempting to mark the breakwall in the manner specified by the regulatory procedures.

This Court must correct the Sixth Circuit's misguided analysis of federalism and re-define the existence and scope of municipal responsibilities and liabilities in maritime affairs. A more reasoned opinion from this Court which follows long-standing precedent will impact literally thousands of municipal corporations and port authorities which are situated adjacent to the navigable waters of the United States including the East, West and Gulf Coasts, Inland Rivers, and the Great Lakes.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari must be granted and the judicial alchemy practiced by the Sixth Circuit — which interpolates an unneeded and unnecessary exception into the Suits in Admiralty Act — must be conclusively rejected.

Respectfully submitted,

CHRISTOPHER D. KUEBLER
Counsel of Record
O'BRYAN, BAUN AND COHEN, P.C.
Attorneys for Petitioners
401 Old South Woodward
Suite 320
Birmingham, Michigan 48009
(248) 258-6262

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 27, 1997

No. 96-3769

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIANNA LAWSON, DAVID LAWSON, MICHELE LAWSON, and JUSTIN LAWSON,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, LORAIN COUNTY PORT AUTHORITY, and CITY OF LORAIN, OHIO,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATE DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: BROWN, NORRIS, and DAUGHTREY, Circuit Judges.

PER CURIAM. Dianna Lawson and her family appeal the dismissal of their suit against the United States, the City of Lorain, and the Lorain Port Authority. She was seriously injured when a motorboat in which she was riding crashed into a breakwater constructed and maintained by the U.S. Coast Guard. The district court dismissed most of the Lawsons' claims against the United States under the "discretionary function exception" to the Suits in Admiralty Act. 46 U.S. §§ 741-52. The district court ruled against the Lawsons on summary judgment on the

remaining claims, finding that the lights on the breakwater were functioning properly at the time of the accident and that the city and port authority were not responsible for the breakwater. Because the district court correctly applied the discretionary function exception to these facts, because the evidence shows that the breakwater lights were operating as intended, and because the Coast Guard is solely responsible for the breakwater, we find no reversible error and affirm the district court's judgment.

PROCEDURAL AND FACTUAL BACKGROUND

After spending the afternoon and evening at a friend's birthday party, David Lawson joined his brother-in-law, Fred Rowe, on Rowe's motorboat. They left the dock at Lorain, Ohio, about 10:00 or 10:30 p.m. and traveled around the shore of Lake Erie. The weather was clear and the sky was dark, with visibility at six miles and a slight haze in the air. After a while, they picked up Dianna Lawson, David's wife, and Rowe's two-year-old daughter at the Lorain harbor. They purchased some beer at a local store and the four of them set out into Lake Erie around midnight.

Breakwaters — long, permanent, cement structures installed to minimize surf and erosion — flank the entrance of the Lorain harbor. To leave the harbor and reach the open water of Lake Erie, a boat must travel along and around these breakwaters. As they left the dock, David Lawson started driving the boat, but had some trouble handling it and Rowe had to take over. Rowe and Lawson claim that they were traveling very slowly, but a Coast Guard attendant saw the boat "speeding up the river" and ordered them to slow down as they approached the breakwaters. At this time, while they were still inside the breakwaters, Rowe's

daughter became restless and Rowe asked Lawson to steer the boat for him.

Lawson intended to travel along the final breakwater and out into the open water. The last breakwater extends about 2150 feet along the coast and has two "aids to navigation" on either end. The west end has a 60-foot tower with a white, rotating or "blinking" light. The east end has a 25-foot tower with a blinking yellow light. Lawson planned to travel west, toward the mouth of the harbor and the white, westerly light. As they approached the breakwater, however, Lawson and Rowe became confused about their location. They saw the white light of the west tower and misidentified it as the light of another boat. Because of this, Rowe and Lawson believed they were already in the open water and Rowe told Lawson to "throttle up." But before Lawson could accelerate, their boat crashed into the breakwater, about 540 feet from the east end.

The breakwater crushed the front, right section of the bow. The collision tossed about everyone on the boat. Dianna Lawson, who had been resting inside the bow, lay totally paralyzed on the floor. David Lawson and Rowe also suffered injures, but the boat was still floating and functional. Rowe restarted the engine and idled back to the Lorain harbor. Once there, the Coast Guard summoned paramedics to treat the passengers. The Coast Guard representatives on site also noticed that Lawson and Rowe smelled of alcohol and that empty beer cans littered the inside of the boat. The local authorities later charged and convicted David Lawson with reckless operation of a motorboat, failure to operate a boat at a safe speed, and failure to maintain a proper lookout. At the hospital following the accident, the laboratory determined that David Lawson's blood-alcohol level was .254 grams per deciliter, more than two and a half times the legal limit.

After the accident, the Lawsons sued the United States under the Suits in Admiralty Act. 46 U.S.C. §§ 741-752. In their complaint, they claimed that the Coast Guard had not properly marked the breakwater and that the existing light on the west end of the breakwater was not functioning properly. The Lawsons also filed suit against the City of Lorain and the Lorain Port Authority for their failure to properly mark and maintain the breakwater.

The United States government filed motions to dismiss for lack of jurisdiction and for summary judgment. The government argued that the decision not to mark the middle of the breakwater was a discretionary one that falls under the "discretionary function exception" of the Suits in Admiralty Act. The government also argued that both lights on the breakwater were functioning properly at the time of the accident. The government contended that if David Lawson saw a steady light rather than a flashing light at the west end of the breakwater, it was because rotating lighthouses often appear to have a dim, steady light with intermittent bursts of brighter light when viewed at short distances. The City of Lorain and the Lorain Port Authority also moved for summary judgment on the ground that they had no control or responsibility over the breakwater.

The district court ruled in favor of the defendants on summary judgment, and this appeal followed.

DISCUSSION

The Applicability of the Discretionary Function Exception

The plaintiffs' principal argument on appeal concerns the applicability of the discretionary function exception to the Suits

in Admiralty Act. They make a valiant but, in the end, unsuccessful effort to convince us that the discretionary function exception, made explicit in the Federal Tort Claims Act, 28 U.S.C. § 2680(a), should not apply to the Suits in Admiralty Act.

The discretionary function exception provides that although the federal government has waived its sovereign immunity in limited cases, that immunity remains intact when government agents exercise their discretionary judgment in making policy decisions. The United States Supreme Court has outlined two requirements for the application of the discretionary function exception to statutory liability: (1) the acts must involve a true discretionary choice, not one prescribed by statute or regulation; and (2) that choice must be one that touches on public policy considerations. *United States v. Gaubert*, 499 U.S. 315, 326 (1991). The Federal Tort Claims Act has an express provision creating such an exception, which the plaintiffs argue should not apply to the Suits in Admiralty Act.

Existing precedent in this circuit and most other circuits, however, has already decided this issue. While the Suits in Admiralty Act does not explicitly provide for a discretionary function exception, this court and other courts of appeal have found an implicit exception similar to one contained in the Federal Tort Claims Act. *Graves v. United States*, 872 F.2d 133, 137 (6th Cir. 1989); *Wiggins v. United States*, 799 F.2d 962, 965 (5th Cir. 1986); *Estate of Callas v. United States*, 682 F.2d 613, 619-20 (7th Cir. 1982). *But see Lane v. United States*, 529 F.2d 175, 179 (4th Cir. 1975) ("[The Suits in Admiralty Act] contains no discretionary function exception."). The plaintiffs are aware of this precedent but urge this court to "avoid perpetuating a legal anomaly [and] reverse course from its prior rulings."

We, however, do not have the authority to overrule existing circuit precedent. Only an intervening decision of the United States Supreme Court or an *en banc* panel of the entire court may change established case law. *LRL Properties v. Portage Metro Housing Auth.*, 55 F.3d 1097, 1105 n.2 (6th Cir. 1995). Moreover, we conclude that the application of the discretionary function exception to the Suits in Admiralty Act rests on solid legal reasoning and should not be overturned. *See generally United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Air Lines)*, 467 U.S. 797, 814 (1984) (describing the history and rationale behind the exception).

The Discretionary Function Exception in this Case

The plaintiffs next contend that if the discretionary function exception does apply to the Suits in Admiralty Act generally, it should not apply in this case. They first argue that the Coast Guard has no discretion in the installation of such "aids to navigation" as the lights on the Lorain breakwater. Next, they argue that the placement of lights on a Coast Guard breakwater is not a "policy" decision for which sovereign immunity is appropriate. Finally, the plaintiffs argue that if the discretionary function exception applies, it applies only to the initial decision to place lights on the breakwater and that the government may be negligent in failing to place more lights in the middle of the breakwater. None of these arguments, however, undermines the applicability of the discretionary function exception to these facts.

As a statutory matter, the Coast Guard is not obligated to place lights at every coastal obstruction. The United States Code provides that the Coast Guard "may" establish "aids to navigation," 14 U.S.C. § 81, and "may" provide warning of

underwater obstructions, 14 U.S.C. § 86. In a separate section, the United States Code describes the primary duties of the Coast Guard in general terms, stating that it "shall" provide aids to navigation, among a long list of its categorical duties. 14 U.S.C. § 2. The general declaration of § 2, however, does not contradict the specific powers listed subsequently in the Code. Nor can one read the general duties of the Coast Guard as requiring the government to place lights on specific breakwaters in specific locations. Common sense dictates that the placement of navigational lights, considering the varied contours of the U.S. coastline, is by its very nature a judgment call and a discretionary choice. In spite of the plaintiffs' arguments to the contrary, the Coast Guard's own regulations do not undermine this discretion, nor do they mandate the placement of navigational aids in specific situations. *See* 33 C.F.R. Pts. 62-67; United States Coast Guard, Aids to Navigation Manual.

The plaintiffs respond to these statutory declarations by claiming that the placement of navigational aids on a breakwater is not a "policy" decision under the discretionary function exception. Specifically, they argue that private citizens may install navigational aids and that the government was merely acting like a private individual when it installed the lights at the Lorain breakwater. The United States Code, however, makes the installation of navigational aids without Coast Guard approval a misdemeanor, even when a government body installs the navigational aid. 14 U.S.C. § 83. Private citizens may install navigational aids, but they must have the permission of the Coast Guard and the navigational aids must meet Coast Guard requirements. *See* 33 C.F.R. Pt. 66. Because of the importance of navigational aids and the legal restrictions surrounding the placement of navigational aids, we can only conclude that the Coast Guard's authority over those aids is one of public policy.

Finally, the plaintiffs argue that once the Coast Guard decides to mark a breakwater with navigational aids, the government may be liable for negligently failing to provide an adequate number of navigational aids. This argument has some precedential support. Once the government exercises its discretion and acts in a particular way, the Suits in Admiralty Act waives sovereign immunity for the implementation of that decision. In the case of *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), the Supreme Court held that the Coast Guard could be held liable for its negligent operation of a lighthouse once it exercised its discretion and built the lighthouse. *Id.* at 69. Subsequent case law from other circuits have also applied *Indian Towing* in a way that would make the Coast Guard liable for malfeasance once a discretionary choice has been made. *See, e.g., Eklof Marine Corp. v. United States*, 762 F.2d 200 (2nd Cir 1985) (citing *Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951)).

Both *Eklof* and *Somerset Seafood* address situations in which the Coast Guard decided to install a single buoy to mark an underwater obstruction, but the buoy was either misplaced or not properly maintained. *Eklof*, 762 F.2d at 203; *Somerset* 193 F.2d at 635. The Second Circuit in *Eklof* held that liability would attach for the misplacement of a buoy and for the failure to properly mark an obstruction once the Coast Guard exercised its discretion to place the buoy. *Eklof*, 762 F.2d at 203. Taking *Eklof* alone, it would seem that the Coast Guard might be liable for its decision not to place additional lights on the Lorain breakwater, once it decided to put some lights on the breakwater.

The case law in this circuit, however, suggests an opposite conclusion. In *Graves*, we held that once the government decides to place signs on a river, warning of a downstream dam, the

number and type of signs it decides to place remains a discretionary choice. 872 F.2d at 137. The court reasoned that discretionary choices include the initial decision to act as well as the government's discretionary judgment over how much action it should take. Similarly, in the case *In re Ohio River Disaster Litigation*, 862 F.2d 1237 (6th Cir. 1988), we determined that discretionary choices include the decision to maintain a dam as well as the judgment calls required in the sophisticated operation of the dam. *Id.* at 1247-48. Referring to the operation of the dam, the court stated, "[W]hether this was the correct decision is not for us to second-guess. The purpose of the exception is 'to prevent courts from intruding, through the vehicle of tort suits, upon the decision-making authority of the other branches of government.' " *Id.* at 1248 (quoting *Estates of Callas*, 682 F.2d at 620).

Given the language of *Graves* and *In re Ohio River Disaster Litigation*, we conclude that the decision to place only two navigational aids on the Lorain breakwater remains part of the Coast Guard's discretionary authority. Unlike *Eklof* or *Somerset*, this is not a situation where the misplacement of a buoy by the Coast Guard became "a trap for the ignorant or unwary rather than a warning of danger." *Somerset*, 193 F.2d at 635 (quoted by *Eklof*, 762 F.2d at 203). The placement of two lights on the Lorain breakwater, one on either end, did not lure boaters into the breakwater. In this case, the location of the breakwater and the location of the lights were plain and obvious, published in the Coast Guard's material for boaters and in its harbor charts. The existence of the lights themselves did not cause this accident.

As a result, the Coast Guard enjoys sovereign immunity over its decision not to place additional lights on the Lorain breakwater. We hold that selection of the number and location

of these navigation aids is a discretionary function that falls outside the Suits in Admiralty Act under the discretion function exception. Because the exception applies, the district court did not have jurisdiction over those claims against the federal government pertaining to the installation of navigational aids on the breakwater. The court, therefore, properly dismissed these claims.

The Operation of the Existing Lights

The discretionary function exception does not apply, however, to the way in which the Coast Guard maintains and operates its existing navigational aids. The operation of existing lights is not a discretionary choice, unlike the decision to install a light in the first place. The Suits in Admiralty Act, therefore, would attach liability if the Coast Guard negligently maintained the Lorain breakwater lights. *See Indian Towing Co.*, 361 U.S. at 69.

The district court considered the Lawsons' claim that the west light on the breakwater was not functioning properly. Viewing all the evidence in a light most favorable to the Lawsons, the court determined that the light was functioning as intended. The Lawsons appeal this decision, claiming that David Lawson saw a solid white light, not a blinking light, which is why he mistakenly believed that he was in the open water of Lake Erie.

Coast Guard attendants on duty the night of the Lawsons' accident found both of the Lorain breakwater lights functioning properly immediately before and after the accident. What Lawson mistook as a solid white light was undoubtedly the dim glow of the rotating east light as the beacon turned out to the

open water. The west end light is bright enough to be seen 19 miles away on a clear night, so powerful that one looking at it from a close distance could mistakenly see a dim, solid light between the rotating "blinks" of the brighter light.

In discovery and in their motions for summary judgment, the parties carefully explored this solid light "phenomenon." In the Coast Guard's own literature and in other materials, boaters are warned that blinking navigational aids may appear as solid lights when viewed at a close distance. For this reason and for other general safety concerns, boaters are warned not to rely on just one navigational aid as they maneuver their boats. Unfortunately, Lawson relied on only one light and misidentified it.

Considering all the evidence regarding the operation of the west light and the appearance of blinking lights as solid, dim lights when viewed at close distances, we find no genuine issue of material fact in dispute. Although David Lawson claims that he saw a solid light right before he crashed into the breakwall, his claim amounts to a mere scintilla when compared to the other evidence. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). As a result, the Lawsons have not met their burden of overcoming the government motion for summary judgment. For this reason, we affirm the district court's summary judgment order.

The City of Lorain and the Lorain Port Authority

The Lawsons also filed suit against the City of Lorain and the Lorain Port Authority for failure to properly maintain the breakwater and provide lights on the breakwater. The district court dismissed the claims against the City and Port Authority

on summary judgment because neither has authority over the breakwater, nor did they have any responsibility over the navigational aids.

The district court's ruling on these claims against the remaining defendants must be affirmed. The Coast Guard maintains control and responsibility of the Lorain breakwater and the navigation aids by federal statute. 14 U.S.C. §§ 2, 81. Had the city or port authority attempted to mark the breakwater, they would have interfered with the Coast Guard's jurisdiction and could have been subject to criminal penalties. 14 U.S.C. § 83.

Discovery

In a final salvo, the Lawsons claim that the district court denied them due process under the Fifth and Fourteenth Amendments when it limited the scope of discovery. In support of this claim, however, the plaintiffs offer no law or explanation of how the district court violated their rights. As a result, one can only assume that this unargued, unsupported issue has been waived. *In re Julien Co.*, 44 F.3d 426, 432 (1995).

CONCLUSION

The Coast Guard's decision to place navigation lights on the Lorain breakwater is a discretionary one exempted from the Suits in Admiralty Act by the discretionary function exception. The decision to place two lights on the breakwater is also exempt under the same exception. As a result, the plaintiffs may not maintain a claim against the United States for its failure to add more lights to the Lorain breakwater. In addition, except for David Lawson's testimony, all the evidence presented to the court

overwhelmingly supports the conclusion that the existing breakwater lights were functioning properly. For these reasons, we AFFIRM the district court's judgment in favor of the United States.

As for the other defendants in this suit, the City of Lorain and the Lorain Port Authority, neither had a legal duty or even an absolute right to add lights to the Lorain breakwater. As a result, they cannot be held liable for Dianna Lawson's injuries. For this reason, we also AFFIRM the district court's summary judgment in favor of the City of Lorain and the Lorain Port Authority.

APPENDIX B — MEMORANDUM OF OPINION AND ORDER AND JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION FILED APRIL 30, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:91 CV 402

JUDGE PATRICIA A. GAUGHAN

Dianna Lawson, et.al.,

Plaintiff,

vs.

United States of America, et.al.,

Defendants.

Memorandum of Opinion and Order

This action stems from the collision of a pleasure boat with a breakwall on Lake Erie in Lorain Harbor. Pending before this court are two magistrate decisions: (1) recommendation granting defendant United States of America's (USA) motion to dismiss and (2) recommendation granting defendants the City of Lorain, Lorain Port Authority (LPA) and USA's motions for summary judgment. Pursuant to Federal Rule of Civil Procedure 72(b), this court has made a de novo determination upon the record and for the following reasons accepts the recommended decisions of the magistrate.

Appendix B

In June, 1990, plaintiffs Dianna and David Lawson were riding as passengers in a boat owned and operated by Fred Rowe. As the boat was proceeding through the inner harbor, David Lawson took control of the boat when Rowe had to attend to his daughter. A breakwall of approximately 2200 feet extended into a portion of the harbor. A fog horn was located on the breakwall and a navigational light was placed at either end of it. No light or navigational aid was placed in the middle of the breakwall. The boat collided with it near its middle after Lawson became disoriented when he could not see the navigational lights.

Plaintiffs sued alleging, inter alia, that defendant USA was negligent in not adequately designing or installing the breakwall, not using the correct type and number of navigational aids to mark the breakwall, and improperly positioning the navigational aids. Plaintiffs further alleged that the navigational aids which were placed on the breakwall, i.e. the westerly light and the fog horn, were not working properly. Plaintiffs' claims are brought pursuant to the Suits in Admiralty Act (SAA) and the Federal Tort Claims Act (FTCA).

Defendant USA moved to dismiss the amended complaint for lack of subject matter jurisdiction on the ground that it is immune from suit on all but two of plaintiffs' claims due to the application of the discretionary function exception to the SAA and the FTCA (Doc.20). Specifically, defendant sought partial dismissal of Count I Paragraph 20 sections a -m and as realleged in Counts II and III.[1]

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1. The allegations include, (a) failure to warn . . . of the dangers . . . of the breakwall . . . at night; (b) failure to paint the breakwall with reflective paint . . . ; (c) failure to adequately mark the breakwall; (d) failure to install sufficient number of lights; (e) failure to install lights with sufficient candle power; (f) failure to install lights at more appropriate locations; (g) allowing a navigation hazard to exist; (h) failure to test,

(Cont'd)

Appendix B

On November 26, 1991, Magistrate Streepy rendered a decision on defendant USA's motion to partially dismiss plaintiffs' amended complaint. Upon reviewing the parties' briefs, Magistrate Streepy recommended granting defendant's motion. Plaintiffs filed objections to the decision and the defendant USA replied. The decision is accepted.

Magistrate Streepy found that all of plaintiffs' claims which related to the alleged negligent failure of the U.S. Coast Guard to adequately design and install the breakwall and select a sufficient number and type of navigational aids at appropriate locations are barred by the discretionary function exception to the SAA and FTCA. This exception is found at 28 USC §2680(a) and applies to claims brought under the FTCA. The exception also applies to actions under the SAA. *Graves v. US,* 872 F.2d 133 (6th Cir.1989), *In Re Ohio River Disaster Litigation,* 862 F.2d 1237 (6th Cir.1988).

Magistrate Streepy accepted defendant's argument that only once the Coast Guard exercises its discretion and decides to operate navigational aids, is it obligated to use due care to make certain they are kept in good working order. Therefore, those allegations of plaintiffs' complaint which related to negligently maintained aids to navigation were not within the discretionary function exception.[2]

(Cont'd)
maintain and/or inspect the lighting on the breakwall; (I) failure to provide notice . . . that the lighting was inadequate; (j) improper operation of aids to navigation; (k) improper management of aids to navigation (l) improper installation of aids to navigation; and (m) negligent design and/or installation of the breakwall.

2. These allegations are sections (n) and (o) of Paragraph 20 relating to the alleged failure to ensure the proper functioning of the aids on the breakwall, i.e. the westerly light and the fog horn.

Appendix B

In *United States v. Gaubert*, 499 US 315 (1991), citing *Berkowitz v. United States*, 486 US 531 (1988), the court held:

> The discretionary function exception covers only acts that are discretionary in nature, acts that involve an element of judgment or choice. . . . The requirement of judgment or choice is not satisfied if a federal statute . . . prescribes a course of action for an employee to follow, because the employee has no rightful option but to adhere to the directive. . . . Even assuming the challenged conduct involves an element of judgment, it remains to be decided whether that judgment is of the kind that the discretionary function was designed to shield. . . . Because the purpose of the exception is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort, when properly construed, the exception protects only governmental actions and decisions based on considerations of public policy. . . . Thus, in determining whether the (discretionary function exception) applies in a given case, a court must first inquire whether the challenged actions were discretionary or were instead controlled by mandatory statutes or regulations.

Generally, the authority and ability to mark navigational obstacles is given to the US Coast Guard. Title 14 USC §81

provides in part, "In order to aid navigation and to prevent disaster . . . the Coast Guard may establish, maintain and operate (1) aids to maritime navigation . . .". Further, under 14 USC §86, the Secretary of Transportation, through the US Coast Guard is empowered to "mark for the protection of navigation . . . obstruction(s) existing in navigable waters . . . in such manner and for so long as, in his judgment, the needs of maritime navigation require." Both statutes confer discretionary authority on the Coast Guard.[3]

However, while the duty is discretionary, once it is exercised the Coast Guard must use due care to make certain the navigational aids are maintained. "Once the government makes a policy decision protected by the discretionary function exception, it must proceed with due care in the implementation of that decision." *Sumner v United States,* 794 F.Supp 1358 (M.D.Tenn.1992). Thus in *Indian Towing Co. v. United States,* 350 US 61 (1955) the court stated that the "Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light . . . it was obligated to use due care to make certain that the light was kept in good working order . . ."

The Magistrate relied on *Corporacion Insular de Seguros v. United States,* 646 F.Supp 1230 (D.Puerto Rico 1986) for the proposition that the Coast Guard has no duty to establish an aid to navigation and cannot be held liable for failing to do so. In *Corporacion,* the defendant was not held liable for not marking a breakwater with which the plaintiffs collided. While the

3. Note that both sections use language that is not mandatory. §81 states the Coast Guard "may" establish aids to maritime navigation and §86 states the Coast Guard is empowered to mark obstructions in such manner as "in his judgment" needs require.

adjacent pier had two red flashing lights, the breakwater was completely unlit. The *Corporacion* court relied on *Bearce v. United States,* 614 F.2d 556 (7th Cir.1980), wherein the court found the defendant's decision to not place a light on a breakwater extending perpendicular from another breakwater on which a flashing light was maintained, was not reviewable as protected by the discretionary function exception. However, the court noted that while in this instance the decision was made to not establish an aid, it recognized that according to *Indian Towing* once a duty was undertaken, due care must be exercised.

Here, it is undisputed that the Coast Guard did undertake to place some aids to navigation on the breakwall i.e., two lights and a foghorn. Plaintiffs urge, then, that this court has subject matter jurisdiction to review the allegations contained in Paragraph 20 sections a-m inasmuch as once the defendant exercised its discretionary duty, it was under a duty to use due care. However, the allegations contained in Paragraph 20 sections a-m allege negligence in the initial design, installation and marking of the breakwall. These decisions are protected by the discretionary function exception since defendant did not have a duty to undertake the building or marking of the breakwall. The Magistrate agreed with defendants that there is no jurisdiction to review for negligence the government's decisions in the construction of the breakwall and the extent and manner of providing aids to navigation. If the courts had jurisdiction to review the defendant's decisions in the use of the markings, the discretionary function exception would be rendered meaningless.[4] Further, the discretionary function exception

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4. The court takes note that some courts have held that there can be liability for negligence once the discretion is exercised. For example, in *Somerset Seafood Co. v. United States,* 193 F.2d 631 (4th Cir. 1951), the government could be held liable for negligence where it chose to mark a

(Cont'd)

applies even when the discretionary acts themselves constitute negligence. *Flynn v. United States*, 902 F.2d 1524 (10th Cir.1990). As to the aids to navigation that defendant did place on the breakwall, it was responsible to exercise due care to maintain them once it opted to use its discretionary authority. Thus, defendant's motion to dismiss should be granted because the court lacks subject matter jurisdiction over all the allegations contained in ¶20 except those which relate to the Coast Guard's duties after marking the breakwall.

All defendants moved for summary judgment (Docs. 55,65 and 101). Magistrate Streepy recommended granting all the motions. For the following reasons, the decision is accepted.

Defendants City of Lorain and LPA have filed separate motions. However, they will be discussed together since they

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(Cont'd)

wreck with a buoy but placed it over 500 feet from its proper location. "There is certainly no discretion to mark a wreck in such a way as to constitute a trap for the ignorant or unwary rather than a warning of danger." Similarly, in *Eklof Marine Corp. v. United States*, 762 F.2d 200 (2d Cir.1985), the government was held liable for negligently marking a reef. "We agree that, if the Coast Guard had left Diamond Reef completely unmarked, there would be no basis of liability . . . (b)ut where, as here, the Coast Guard has acted to mark an obstruction or maritime danger, a duty arises to do so in way that does not create a new hazard." Confer also, *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), where the court concluded that failure to light a mooring buoy did not fall within the discretionary function exception because the omission amounted to a failure to warn of an obstruction to navigation that the Navy had placed in navigable waters. Nevertheless, in the two Sixth Circuit cases, *Graves* and *Ohio River Disaster*, supra, the courts held the United States immune from suit for decisions made in the operation and discretionary function exception because the omission maintenance of dams.

are granted under the same legal theory. Defendants move for summary judgment under various legal bases. Since summary judgment is warranted under the first argument, the remaining theories will not be addressed.[5]

After reviewing all the evidence submitted, the Magistrate concluded it was uncontroverted that the Coast Guard, not Lorain or LPA, built and had control over the breakwall. The Magistrate further found that there was no legal duty on Lorain or LPA under state or federal law to seek permission for the placement of aids to navigation on the breakwall. The Magistrate rejected plaintiffs' claims sounding in nuisance and negligence as he found the evidence showed that neither defendant possessed or exercised control or authority over the breakwall. His decision is affirmed as the court agrees with and accepts the reasoning therein upon review of the briefs.

Finally, defendant USA moved for summary judgment on the two remaining allegations of plaintiffs' amended complaint. The Magistrate reviewed the briefs to determine whether there was an issue of fact as to these allegations, i.e. whether the aids to navigation were not adequately functioning or displaying their proper characteristics as indicated on navigational charts and

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5. Defendants Lorain and LPA move for summary judgment based upon three arguments: (i) that the maintenance of the breakwall and establishment of navigational aids is the sole responsibility of the US Coast Guard and this function delegated to the Coast Guard by federal statute preempts the role of local authorities, (ii) Lorain and LPA are political subdivisions immune from lawsuits of this nature under ORC §2744 and (iii) the sole and proximate cause of plaintiffs' injuries was the actions of plaintiffs or Fredrick Rowe and not the defendants. Magistrate Streepy extensively addressed and discussed each of these arguments and his recommendation should be incorporated herein.

light lists, namely, that the fog horn was not working properly and the westerly light was not displaying the indicated flashing characteristics. The Magistrate determined that the evidence was uncontroverted that the subject light at the end of the breakwater was working properly at the time of the accident. The plaintiffs' objections to the report argue that the Magistrate made an improper factual finding in that according to defendant's affidavit testimony, the light was observed one hour after the accident and not at the time of the accident. However, the defendant submitted Coast Guard testimony of observation of the light prior to the accident noting that it was "watching properly". Thus, the Magistrate correctly found no issue of fact since there was no contrary evidence that the light was not working properly. The Magistrate further noted that while plaintiff David Lawson asserts that he observed a continuous light and not a flashing light, this is consistent with the normal phenomenon of believing a flashing light to be a continuous light when observed at short distance.[6] This phenomenon was communicated to boaters in the Light List for 1990, which states that at short distances some flashing lights may show a faint continuous light between flashes. The magistrate correctly found that there was no genuine issue of material fact whether the flashing light on the breakwall was properly working. Since it was properly working, there was no cause of action in regard to its condition or operation.

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6. In fact, in plaintiffs' brief in opposition to defendant's motion for summary judgment, plaintiffs recognize this phenomenon and state that it is this that David Lawson observed. Plaintiffs then urge that defendant, who knew of the phenomenon, mislead them and was negligent in failing to conspicuously provide notice of it in the navigational chart. Plaintiffs admit notice was provided in the Light List but argue this was insufficient as it was in the "fine print". Plaintiffs further argue defendant was negligent in failing to select a light which eliminated this phenomenon. However, plaintiffs do not support these conclusory statements with any evidence.

Appendix B

The Magistrate further found no issue of fact as to whether defendant may be held liable for an improperly working fog horn. The fog horn was not sounding at the time of the accident as it had been purposely deactivated due to a defect. The Magistrate correctly found that mariners were advised of the deactivation. The Magistrate further found the evidence to be that even had the fog horn been operating properly, it would not have been sounding as the visibility at the time of the accident exceeded that amount necessary for the activation of the horn.[7] The Magistrate correctly concluded that since the horn would not have been sounding had it been working properly, no liability would attach for its improper operation.

Finally, the Magistrate also rejected plaintiffs' contentions as to the inadequacies of the navigational charts and the Light List. It is undisputed that Lawson, who was operating the boat at the time of the accident, did not consult the Light List or navigational charts. It is further undisputed that had Lawson consulted the Light List, he would have been informed of the continuous light phenomenon. The light list also warned mariners not to rely on any single aid to navigation or sound signals to determine position. Additionally, whether or not Lawson read the Light List, the defendant was relieved of liability since it informed the reader of the continuous light

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7. Defendant's affidavit testimony is that the fog horn activates when visibility is less than three miles. Plaintiffs argue that conditions were hazy and visibility, therefore, poor at the time of the accident. However, the operator's (David Lawson) deposition testimony is that the weather was clear and calm, although dark. (see pps. 48, 72-73) Additionally, plaintiffs' own evidence contains a report of a Coast Guard officer who arrived at the scene of the accident and noted that visibility was about 6 miles with haze. Thus, plaintiffs' evidence does not raise an issue of fact as to whether visibility was obscured or less than three miles.

phenomenon and the fact that a fog horn would not sound in clear weather. *Corporacion* at 1236.

The Magistrate's recommendation in granting defendant USA's motion for summary judgment is accepted.

For the foregoing reasons, defendant USA's motion to dismiss is granted and defendant USA, defendant LPA and defendant City of Lorain's motions for summary judgment are granted.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:91 CV 402

JUDGE PATRICIA A. GAUGHAN

Dianna Lawson, et.al.,

Plaintiffs,

vs.

United States of America, et.al.,

Defendants.

Judgment Entry

This Court, having filed its Memorandum of Opinion and Order GRANTING defendant USA's Motion to Dismiss (Doc.20) and Defendants USA, City of Lorain and Lorain Port Authority's Motions for Summary Judgment (Docs.55,65 and 101), hereby enters judgment in favor of defendants and against plaintiffs.

IT IS SO ORDERED.

s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

APPENDIX C — REPORT AND RECOMMENDED DECISION OF MAGISTRATE JUDGE FILED MARCH 25, 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

1:91CV0402

JUDGE FRANK J. BATTISTI
(Magistrate Judge Jack B. Streepy)

DIANNA LAWSON, et al

Plaintiffs

v.

UNITED STATES OF AMERICA, et al.

Defendants

REPORT AND RECOMMENDED
DECISION OF MAGISTRATE JUDGE

STREEPY, MAG. J.

Plaintiffs, Dianna Lawson, her husband David Lawson, and their children Michelle and Justin Lawson, bring this action against defendants, the United States of America (USA), the City of Lorain (Lorain), and the Lorain Port Authority (LPA), under the Suits in Admiralty Act, 46 U.S.C. §741, *et seq.* (hereafter, SAA) and the Federal Tort Claims Act, 28 U.S.C. §1346(b) (hereafter, FTCA). Plaintiffs primarily claim that defendants were negligent in maintaining aids to navigation on

the Lorain Inner Harbor breakwall (hereafter breakwall), or were negligent in failing to provide adequate warnings on the breakwall, which caused the boat which David Lawson was navigating, and in which Dianna Lawson was a passenger, to allide (collide) with the breakwall.[1] Now pending are defendants' motions for summary judgment.

Shortly after midnight on July 26, 1990, David and Dianna Lawson, with Mr. Rowe and his daughter, were riding in a 19-foot Welcraft boat on Lake Erie in Lorain Harbor. Mr. Lawson took the helm when Mr. Rowe was obliged to tend to his daughter, who was misbehaving. (Plaintiffs' exhibit, PX, A, attached to plaintiffs' brief in opposition to U.S.A. motion for summary judgment, affidavit of David Lawson, ¶2.) David Lawson was looking for a flashing light marking the breakwall and listening for a horn, as he recalled from the navigational charts the existence of a flashing light and "horn." He observed a continuous light which did not appear to be flashing, and which he mistook as a sailboat's masthead light. (PX A, ¶4) Despite the fact he was disoriented, he continued operating the boat and moments later struck the breakwall.

David Lawson was subsequently criminally charged and convicted of reckless operation, failure to maintain a safe speed and failure to maintain a proper look-out. He was also charged with DUI, but not convicted. Blood alcohol test results were ruled inadmissible against him. (Lorain exhibit, LX, E, attached to motion for summary judgment.)

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1. A report and recommendation was previously issued recommending that all claims against defendant United States be dismissed except for two claims of negligence found in subparagraphs 20(n) and (a) of the first amended complaint (FAP).

Appendix C

I. City of Lorain and Lorain Port Authority

Lorain and LPA each advance three arguments in support of their separate motions for summary judgment: (l) the United States exercised exclusive and preemptive jurisdiction over the breakwall; (2) they enjoy sovereign immunity; and (3) the negligence of David Lawson was the proximate cause of plaintiffs' injuries.

A. The State Law Claims

Plaintiffs state that "Ohio law does not apply to the instant litigation" and that it involves a maritime tort. (Plaintiffs' supplement to brief in opposition to Lorain Port Authority's motion for summary judgment, filed August 19, 1992.) However, the FAC asserts supplemental jurisdiction pursuant to 28 U.S.C. §1367 (FAC ¶3) as one of the bases of jurisdiction, and it arguably asserts claims of negligence, nuisance, and loss of consortium under Ohio law. Moreover, defendants' claims of sovereign immunity and proximate cause are primarily related to state claims.

A tort falls under admiralty jurisdiction when it meets both "locality" and "maritime nexus" elements. *In re Exxon Valdez,* 767 F.Supp. 1509, 1511 (D. Alaska 1991). The locality requirement is satisfied where, as here, the collision occurs on navigable waters. *Id.* The "maritime nexus" requirement is met if the collision bears a significant relationship to traditional maritime activity, which includes collisions involving pleasure boats on navigable waters. *See Foremost Ins. Co. v. Richardson,* 457 U.S. 668, 672-75 (1982) (maritime jurisdiction over collision between two recreational boats in navigable waters created a potential hazard to maritime commerce arising out of

activity, thus bearing a substantial relationship to traditional maritime activity); *Respess v. United States,* 586 F.Supp. 861 (E.D.La. 1984). This court has admiralty jurisdiction.

When a cause of action based on a maritime tort is asserted, the maritime law is the substantive law applied. *In re Exxon,* 767 F.Supp. at 1513. The plaintiff cannot elect to have defendant's liability measured by state common law standards rather than maritime law standards. "In order to preserve uniformity, maritime law must be applied to torts cognizable under admiralty jurisdiction regardless of how plaintiffs characterize the tort under common law. Uniformity is the justification for exclusive federal admiralty jurisdiction." *Id.* at 1514; *see also, Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953). State law claims for loss of consortium are not viable in a maritime tort case, *see Igneri v. Cie. de Transports Oceaniques,* 323 F.2d 257 (2nd Cir. 1963), *cert. denied,* 376 U.S. 949 (1964); but there may be a federal admiralty claim for loss of consortium, *Lemon v. Bank Lines, Ltd.,* 411 F.Supp. 677, 678 (S.D.Ga. 1976).

Any pendent state law claims are not actionable. Only federal admiralty law applies.

B. The Federal Claims

The remaining issue is whether summary judgment should be granted Lorain and LPA on the federal claims.

Defendants raise state sovereign immunity as a defense. In actions based on general maritime law, such as this case, a municipality or other political subdivision does not enjoy the protection of state-granted sovereign immunity or other such limitations of liability. *Pelican Marine Carriers, Inc. v. City of*

Tampa, 791 F.Supp. 845, 856 (M.D. Fla. 1992), *aff'd* 4 F.3d 999 (1993); *see also Workman v. Mayor, Aldermen and Commonality of the City of New York*, 179 U.S. 552, 573-74 (1900); *Principe Compania Naviera, S.A. v. Board of Commissioners of Port of New Orleans*, 333 F. Supp. 353 (E.D.La. 1971). Since this court has federal maritime jurisdiction over plaintiffs' claims, sovereign immunity is not a valid defense.

Defendants further contend that the USA had the sole responsibility to install and maintain aids to navigation on the breakwall. They contend they had no duty to see to it that additional aids to navigation (including additional safety lights and/or horns) were installed and kept in good working order on the breakwall, and had no duty to warn. Plaintiffs raise two claims, nuisance and negligence.

C. Nuisance

The FAC generally alleges that defendants were negligent. In addition, plaintiffs contend that defendants created a nuisance, that is, an inadequately marked breakwall (plaintiffs' brief opposing LPA's motion for summary judgment, p.8). Neither Lorain nor LPA are liable in nuisance for the following reasons.

Plaintiffs do not state whether their nuisance claim is one for a private nuisance, for a public nuisance, or both. Since a private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land, it does not apply since plaintiffs were making public use of public navigable waters, *i.e.*, Lake Erie. A public nuisance is an unreasonable interference with a right common to the public. No such claim exists herein for the following reasons:

Appendix C

> A public nuisance is "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts §821B (1977). There is no federal common law which prohibits obstructions and nuisances in navigable waters. *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 (1888). There must be a direct statute of the United States in order to bring obstructions and nuisances within the scope of the laws of the United States. *Id.* at 8.
>
> Although Congress has enacted Section 10 [33 U.S.C. §401 *et seq.*] to regulate obstructions in navigable waters of the United States, it confers no private right of action. Thus, plaintiff cannot maintain a cause of action for public nuisance based upon the obstruction of a navigable waterway of the United States.

Pelican Marine Carriers, Inc. v. City of Tampa, No. 90-407-CIV-T-10C, 1991 WL 325793 (M.D. Fla. Jul. 30, 1991), at *4. *See also State of New York v. DeLyser*, 759 F.Supp. 982, 991 (W.D.N.Y. 1991) (no federal common law of public nuisance based on an obstruction to navigation).

Assuming there may be a public nuisance cause of action, *Landowski v. Grand Trunk Western R. Co.*, 822 F.2d 600 (6th Cir. 1987), rejected a nuisance claim against a private entity because responsibility for the alleged nuisance rested with the United States:

Appendix C

We note initially that the *Beardstown* court appeared to assume that §10 of the Rivers and Harbors Act, 33 U.S.C. §403 (1986), creates a private right of action in favor of those injured by obstructions to navigation. *See Beardstown*, 750 F.2d at 571 n.1. The implication of such a right was expressly rejected by the Supreme Court in *California v. Sierra Club*, 451 U.S. 287 . . . (1981). Following the approach taken in *Beardstown* would require us to address the issue (alluded to, but no resolved, in *Sierra Club*) of whether the Rivers and Harbors Act not only fails to create a private right of action, but also preempts recovery on a common-law theory of nuisance for injuries caused by obstructions to navigation. *See Sierra Club*, 451 U.S. at 296 n.7. . . . While we need not decide that issue here, we simply observe that the viability, under federal maritime law, of a nuisance recovery for injuries caused by obstructions to navigation is, at best, an open question. . . .

More importantly, we reject the notion that a private party that complies with a federal permit by partially removing structures in a navigable waterway has a continuing responsibility to prevent those structures from becoming navigational hazards. Responsibility for the piers left in the Saginaw River by the Railroad rests squarely upon the federal government. By the

> terms of the permit itself, it was the duty of the Secretary of War (later, the Secretary of the Army) to determine whether any of the piers had become "an unreasonable obstruction to the free navigation" of the river, and then to order the Railroad to carry out any alterations deemed necessary. The permit also placed responsibility upon the United States Coast Guard to determine whether any lights or signals needed to be placed upon the piers.
>
> . . . Under 33 U.S.C. §§1 and 403 (1986), as well as the terms of the permit issued to the Railroad, it is the continuing duty of the Secretary of the Army, and not the Railroad, to prevent obstructions to navigation in the Saginaw River. As the Court declared in *Southern Pacific*, the Railroad here was "justified in proceeding upon the assumption that what the Secretary, in the exercise of his lawful powers, declared to be no obstruction to navigation, was in fact no obstruction." 260 U.S. at 210. . . . Under these circumstances, we decline to impose liability upon the Railroad.

822 F.2d at 605.

This case is even stronger than *Landowski* for the proposition that neither Lorain nor LPA had a responsibility to prevent the breakwall from becoming a nuisance. It is uncontroverted that the Coast Guard, not Lorain or LPA, built

and had control over the breakwall. *See* LPA exhibit, LPAX, A, affidavit of Richard Novak, ¶¶6-8, 10 (U.S. Army Corps of Engineers handled all construction, maintenance and design of breakwall and/or navigational aids thereon; Lorain Port Authority does not own or control breakwall, and has not engaged in maintenance, inspection, testing or other function with respect to breakwall and its navigational aids); LX A, affidavits of Alex Olejko (Mayor of Lorain), ¶¶6-8, 10 and J. Rocky Ortiz (Service Director of Lorain), ¶¶6-8, 10 (U.S. Army Corps of Engineers handled all construction, maintenance and design of breakwall and/or navigational aids thereon; City of Lorain does not own or control breakwall, and has not engaged in maintenance, inspection, testing or other function with respect to breakwall and its navigational aids); LPAX B, affidavit of James Brade, ¶¶1-4 (as civil engineer of U.S. Army Corps of Engineers he was Project Engineer for construction of breakwall in 1964-65); USA exhibit, UX, L, affidavit of William Craig, ¶2 (Ninth Coast Guard District is responsible for establishment and maintenance of public aids to navigation on the Great Lakes, including those in Lorain Harbor and the breakwall in question); LPA answers to interrogatories No. 4, 46 (LPAX E).

Plaintiffs contend that federal regulations permitted Lorain and LPA to place additional aides to navigation on the breakwall if permission was sought from, and granted by, the Coast Guard. Plaintiffs contend defendants' failure to seek permission created the nuisance of an inadequately marked breakwall. This claim is without merit.

Under plaintiffs' version of the law permission to place additional aids to navigation on the breakwall must be granted by the Coast Guard. In other words, control remained in the United States.

Moreover, Ohio law did not impose a legal duty on either Lorain or LPA to seek permission from the Coast Guard. The State of Ohio has the ownership and ultimate legal responsibility over land under Lake Erie (subject to paramount control of the United States), *State ex rel Squire v. City of Cleveland*, 150 Ohio St. 303 (1948), which includes the land on which the breakwall is located. While the state has transferred some of its responsibility to shoreline municipalities, O.R.C. §741.04, that transfer does not include responsibility to seek permission from the Coast Guard in regard to placing additional aids to navigation on the breakwall.

That Lorain cooperated in 1965 with the U.S. Army Corps of Engineers in its construction of the breakwall by, *inter alia*, furnishing necessary easements and rights of way and accomplishing alterations in utility facilities, including power, as needed, (see unmarked exhibits attached to brief in opposition to City of Lorain's motion for summary judgment) does not show it had any authority or control over the breakwall construction or subsequent maintenance of the breakwall.

In summary, the Coast Guard installed aids to navigation on the breakwall, exercised exclusive authority and control over the maintenance thereof, and there was no legal duty under state or federal law on Lorain or LPA to seek permission for the placement of aids to navigation on the breakwall. There is no liability on Lorain and LPA for allegedly creating a nuisance.

D. Negligence

Plaintiffs claim they also have a negligence cause of action under Maritime tort law. Such a cause of action exists for the negligent creation of an obstruction, failure to mark the

obstruction, and failure to warn the public of the presence of the obstruction. *Pelican Marine Carriers*, 1991 WL 325793, at *4, citing *The Philadelphia, Wilmington, and Baltimore Railroad Co. v. The Philadelphia and Havre de Grace Steam Towboat Co.*, 64 U.S. (23 How.) 209 (1959) (railroad company liable for damage to vessel which struck bridge piles left in river by contractors employed by railroad company to build bridge); *Eastern Transportation Co. v. United States*, 272 U.S. 675 (1927) (United States liable for damage to vessel which struck unmarked wreck in a navigable channel by the United States); *Atlee v. Packet Co.*, 88 U.S. (21 Wall.) 389 (1875) (riparian owner who without authority erected pier in navigable water liable for damages to barge which struck pier); *Slater v. Texaco, Inc.*, 506 F.Supp. 1099, 1110 (D. Del. 1981) (one who creates a hidden obstruction in navigable waters has duty to ensure it is marked so as to afford adequate warning to vessels); *Marine Contracting & Towing Co. v. McMeekin Construction Co.*, 302 F.Supp. 804, 808 (D.S.C. 1969) (contractor retained to remove railroad bridge over navigable water liable to barge owner who submerged unmarked bridge pier piles; contractor defendant had duty to place warning buoys over submerged, hidden obstruction).

In the above cases, duties and liabilities were placed on parties who were responsible for the damage causing obstruction, or were responsible for warning the public of an obstruction. These cases do not support plaintiffs' claims against Lorain and LPA because, as discussed above, the evidence shows they did not possess or exercise control or authority over the breakwall.

Plaintiffs assert that defendants exercised "'police powers" over the Lorain harbor area, including operation of a Harbor Patrol and developing the marina area, thus assumed safety

functions and authority over the breakwall as well, and are liable for the negligently operated aids to navigation or negligently marked breakwall. Plaintiffs appear to be relying on the good samaritan rule, which has been recognized in federal maritime tort law. *See Patentas v. United States*, 687 F.2d 707, 713 (3rd Cir. 1982); *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955). That rule is discussed in sections 323 and 324A of the Restatement (Second) of Torts. Where an undertaking is intended to benefit the public, as arguably would be the case herein, section 324A applies, which states (*see Patentas*, 687 F.2d at 716):

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts, §324A (1965).

The foundation of the rule is that Lorain and LPA specifically must have undertaken to perform the task it is charged with having performed negligently. *Patentas*, 687 F.2d at 716. They did not undertake to place aids to navigation on the breakwall, thus the rule is not applicable to them. There are other reasons why the rule does not apply.

Subsection (a) does not apply because there is no evidence defendants took any actions of commission concerning the breakwall. It is a "critical defect" to fail to identify a sin of commission rather than omission. *See Patentas*, 687 F.2d at 716-17. Subsection (b) is not applicable because there is no evidence that defendants undertook to perform a duty owed by another (the Coast Guard) to plaintiffs. Subsection (c) is not applicable because plaintiffs have not submitted evidence that any undertaking taken by Lorain or LPA (as distinguished from undertakings of the Coast Guard) was relied on by plaintiffs. *Patentas*, at 717.

In summary, plaintiffs have not adduced evidence supporting claims against Lorain or LPA under maritime law sounding in nuisance or negligence. They are entitled to summary judgment.

II. The United States

A report and recommendation has previously been issued finding that the only viable causes of action against the United States are failure to ensure that the aids to navigation, which the Coast Guard installed, were functioning properly, and failure to correct deficiencies therein (FAC ¶20(n)), and that the aids to navigation were not adequately functioning or displaying their proper characteristics as indicated on navigational charts, light lists, etc., in that the fog horn was not operating and the light

was not displaying flashing characteristics (FAC ¶20(o)). The Coast Guard has no duty to establish aids to navigation and cannot be held liable for failure to do so. *Corporacion Insular de Seguros v. United States*, 646 F.Supp. 1230, 1234-35 (D.P.R. 1986); *Chute v. United States*, 610 F.2d 7 (1st Cir. 1979), *cert. denied*, 446 U.S. 936 (1980). However, once the Coast Guard has exercised its discretion to operate a navigational aid, it is obligated to exercise due care in making certain the navigational aid is kept in good working order, and is further obligated to use due care to discover inoperative navigational aids and repair them or give warning that the navigational aid is not functioning. *Indian Towing*, 350 U.S. at 69.

The aids to navigation on the breakwall which existed on the relevant date must be analyzed. Those aids were a flashing light and a fog horn.

A. The Harbor Light

At 12:26 a.m. on June 17, 1990, shortly before the allision, a Coast Guard watchman observed the Lorain Harbor Light "watching properly," *i.e.*, the large white rotating light at the end of the outer breakwater was working properly. (UX C, affidavit of Michael S. Murphy.) Shortly after the allision, two coast guard officers observed that the light was displaying the proper characteristics, including color and flash. (UX G, affidavit of David Wilken, ¶¶1-2; UX H, affidavit of Kathy L. Snyder, ¶¶1-2.) These eye witness accounts constitute evidence that the light was working properly at the time of the allision, particularly in view of the short time periods before and after the allision that they observed the light.

David Lawson does not submit contrary evidence. While

he asserts that he observed a continuous light, not a flashing light, this is consistent with the normal phenomenon of seeing, when at short distances, a continuous light instead of a flashing light. This phenomenon was communicated to boaters in the Light List for 1990, which states that at short distances some flashing lights may show a faint continuous light between flashes. (UX E, p. viii)

There is not a genuine issue of material fact whether the flashing light on the breakwall was working properly. Since it was working properly, there is no cause of action in regard to its condition or operation.

B. The Fog Horn

The fog horn was not sounding at the time of the allision. It had been deactivated as of May 3, 1990, and remained so to August 10, 1990, because its fog detector device was not resetting in clear weather, causing it to improperly sound continuously. (UX K, affidavit of William H. Craig, ¶4) Mariners were advised that the fog horn was deactivated by safety and scheduled broadcasts, including the period of June 16 and 17, 1990. *Id.*, ¶5.

Had the fog signal been operating properly, it would not have been sounding at the time of the allision because two Coast Guard officers observed shortly after the allision that visibility was approximately six miles. The fog signal was set to sound only when visibility was restricted to less than three miles. (UX G, H, K, affidavits of David Wilken, ¶4; Kathy L. Snyder, ¶3; and William H. Craig, ¶6) Kathy Snyder reported that visibility was about six miles "with haze."[2] (PX J)

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2. Plaintiffs' other claimed evidence of hazy conditions, a marine coastal weather log (PX G), does not contain the word "hazy."

Appendix C

Since the fog horn, if working properly, would not have been sounding, no liability attaches for an improperly operating fog horn.

C. The Navigational Charts

Plaintiffs contend that the navigational charts did not inform David Lawson of the continuous light phenomenon, thus the United States was negligent. Lawson states[3] in his affidavit:

> If I had been sufficiently warned by a notation on the navigational chart, or I had been otherwise made aware of the characteristic or illusion that a solid white light would be observed at close range, and that therefore I should not rely too heavily on a flashing characteristic at close range, I would not have relied on the flashing light characteristic when I was attempting to gauge the vessel's position and navigate in the area. I would have stopped the vessel dead in the water to determine precisely where we were. However, at that time, I did not feel that we were entirely lost because I was looking for the flashing white light; I was mislead by the indication on the navigation chart that a flashing light existed and that I should be looking for it when attempting to navigate in the area at night at night [sic]. I did exactly

3. It is assumed, without deciding, that the *res judicata* effect of Lawson's convictions do not have an impact on his affidavit.

as I was mislead to do by an inaccurate or misleading navigational chart.

(PX A, ¶4, at 5-6.)

Plaintiffs have submitted a portion of a navigational chart (although they have not stated it was the navigation chart David Lawson said he had previously examined) which includes a warning to whoever reads it that the Light List should be consulted: "WARNING. The prudent mariner will not rely on any single aid to navigation, particularly on floating aids. See U.S. Coast Guard Light List and U.S. Coast Pilot for details." (PX H)

In essence, Lawson states that he did not look at the Light List. The importance of the Light List was noted in a case quite similar to this one. In *Corporacion Insular, supra,* a cabin cruiser ran into a breakwall maintained by the United States Navy. The nautical chart that was relied upon by the pilot of the vessel was erroneous. That error had been rectified in the publication of a Light List prior to the date of the collision at issue. Plaintiff had not consulted the Light List prior to his trip, nor did he have the Light List aboard the boat. The court concluded that plaintiff was negligent for failing to consult the Light List, and also held that "[o]nce having published the chart correction in the Coast Guard Light List, the U.S. Government was thereafter relieved from all liability for the error." 646 F.Supp. at p.1236; see also *DeBardeleban Marine Corp. v. United States,* 451 F.2d 140 (5th Cir. 1971); *Commonwealth of Puerto Rico v. SS Zoe Colocotroni,* 456 F.Supp. 1327, 1334 (D.P.R. 1978).

Had Lawson consulted the relevant Light List, he would have been informed of the continuous light phenomenon from a

flashing light when viewing it at short distances. Irrespective of whether he read the Light List, the fact it informed the reader of the continuous light phenomenon relieves the United States from liability.[4]

The same result obtains in relation to the fog horn. David Lawson recalls reading on the chart the word "horn." He states he was not only looking for flashing lights, but was also listening for a horn. (PX A, ¶4, p.3) Lawson does not contend the chart that he read stated the horn operated continuously.

The navigational chart supplied by plaintiffs shows that there is a "horn" on the breakwall. (PX H) The Light List published in 1990 stated, at page xiv: "Unless it is specifically stated that a sound signal 'Operates continuously,' or the signal is a bell, gong, or whistle on a buoy, it can be assumed that the sound signal only operates during times of fog, reduced visibility, or adverse weather." A notation of continuous operation does not appear in the Light List (UX E, pp. xiv-xv). Page xiv further states, "*CAUTION*: Mariners should not rely on sound signals to determine their position."

The Light List informed Lawson, had he read it, that the horn would not be operating under the conditions which existed when the boat allided, and that he should not rely on it if it was operating.

In summary, the United States discharged its duty in warning David Lawson in the Light List of the continuous light

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4. Plaintiffs' claim the continuous light phenomenon should have been placed on the navigation chart is not well taken in view of the complex and lengthy instructions regarding lights which appear in the relevant Light List, see UX E, pp. viii to ix.

phenomenon, and the limited operation and significance of the fog horn.

RECOMMENDATION

It is recommended that defendants' motions for summary judgment be granted.

Dated: MAR 25 1994

s/ Jack B. Streepy
Jack B. Streepy
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the District Court's order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NOTHERN DISTRICT OF OHIO, EASTERN DIVISION DATED FEBRUARY 27, 1992

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

1:91CV0402

JUDGE FRANK J. BATTISTI
(Magistrate Judge Jack B. Streepy)

DIANNA LAWSON, et al.

Plaintiffs

v.

UNITED STATES OF AMERICA

Defendant

ORDER

STREEPY, MAG.

Discovery and other motions are pending. They are ruled on as follows.

Discovery shall be extended to April 28, 1992, but limited to the "phenomenon" issue as described in plaintiffs' motion.

The United States' motion for a protective order is partially granted, *i.e.*, there shall be no further discovery except in relation to the "phenomenon" issue.

Appendix D

Plaintiffs shall withdraw their second request for production of documents and request for admissions. They may serve other requests, but only limited to the phenomenon issue. Said requests must be served on or before March 13, 1992.

On or before May 12, 1992 (14 days after the 60-day discovery cutoff) plaintiff shall file a supplemental brief in opposition to the United States' second summary judgment motion, in the event such a brief is advisable as a result of the further discovery. The United States shall respond to plaintiffs' supplemental brief on or before May 26, 1992.

Also pending is plaintiff David Lawson's motion for voluntary dismissal of his complaint, but without prejudice. Extensive discovery has already occurred, and defendants have motions for summary judgment pending against David Lawson. His actions appear to be an integral part of the overall complaint, as well as of the counterclaims, whether or not he is a plaintiff. In the interest of judicial efficiency, all issues of liability, including those raised by the complaint of David Lawson, should be decided in one action and one ruling. However, if his complaint is dismissed without prejudice, he could conceivably file a second action in the future, or re-enter this action as a plaintiff. Either alternative would be inefficient when compared to keeping his complaint pending. The motion for voluntary dismissal of David Lawson's complaint without prejudice is denied.

IT IS SO ORDERED.

Dated: FEB 27 1992

s/ Jack B. Streepy
Jack B. Streepy
United States Magistrate Judge

APPENDIX E — REPORT AND RECOMMENDED DECISION OF MAGISTRATE JUDGE FILED NOVEMBER 26, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

1:91CV0402

JUDGE FRANK J. BATTISTI
(Magistrate Judge Jack B. Streepy)

DIANNA LAWSON

Plaintiff

v.

UNITED STATES OF AMERICA

Defendant

REPORT AND RECOMMENDED
DECISION OF MAGISTRATE

STREEPY, MAG.

Plaintiffs, Dianna Lawson, her husband David Lawson, and their children Michelle and Justin Lawson, bring this claim for negligence against defendants, the United States of America, the City of Lorain, and the Port Authority of Lorain, under the Suits in Admiralty Act, 46 U.S.C. §741, *et seq.* (hereafter, SAA) and the Federal Tort Claims Act, 28 U.S.C. §1346(b) (hereafter,

FTCA). Plaintiffs claim that defendants' negligence in illuminating the Lorain Inner Harbor breakwall was the direct or proximate cause of their damages suffered when a boat which David Lawson was navigating, and in which Dianna Lawson was a passenger, allided with the breakwall. (Amended Complaint, ¶¶14, 19 and 20)

Pending before this court is the United States' motion for partial dismissal of the amended complaint for lack of subject matter jurisdiction and failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(1) and (6), on the ground that the United States is immune from suit because all but two of plaintiffs' claims of negligence are barred by the discretionary function exception to the SAA and the FTCA, found at 28 U.S.C. §2680(a). In a motion to dismiss, the court must accept the allegations of the complaint as true. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983); *Lee v. Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062, 1065 (6th Cir. 1984). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Both parties have also submitted affidavits in support of their respective claims. Further discovery is not necessary on the discretionary function issue.

For reasons set forth herein, defendant's motion to dismiss should be granted with respect to all or most of plaintiffs' claims of negligence as summarized in paragraph 20, subparagraphs (a) through (m) and (p), of the amended complaint. The claims

of negligence set forth in subparagraphs 20(n) and (o) are not being challenged.[1]

---

1. The allegations of negligence found in various paragraphs of the amended complaint (see ¶¶14, 19 and 20), are summarized in ¶20 as follows:

> 20. The Defendants, jointly and/or severally, were negligent in one or more of the following respects:
>
> a. Failure to warn the general public of the dangers and hazards of the breakwall when navigating in Lorain Harbor at night;
>
> b. Failure to paint the breakwall with reflective paint or white or safety orange/yellow paint;
>
> c. Failure to adequately mark the breakwall;
>
> d. Failure to install sufficient numbers of lights;
>
> e. Failure to install lights with sufficient candle power;
>
> f. Failure to install lights at more appropriate locations;
>
> g. Allowing a navigation hazard to exist;
>
> h. Failure to adequately test, maintain and/or inspect the lighting on the breakwall;
>
> i. Failure to provide notice to the general public that the lighting was inadequate;
>
> j. Improper operation of aids to navigation;
>
> k. Improper management of aids to navigation;

(Cont'd)

Appendix E

On or about June 16, 1990, plaintiffs Dianna and David Lawson were riding as passengers on a pleasure boat, operated by its owner, Fred Rowe (not a party to this action). The boat was proceeding into the inner harbor of Lake Erie at Lorain, Ohio, located at the mouth of the Black River. Rowe had to relinquish command of the vessel to take care of his two year old daughter. David Lawson took control of the boat. (David Lawson Aff. attached to plaintiffs' brief in opposition to defendant's motion to dismiss) A breakwall, approximately 2,200 feet long, extended into a portion of the harbor. As aids to navigation, a navigational light was placed at either end of the breakwall (amended complaint, ¶12), and a fog horn was located on the breakwall (*id.*, ¶14).

(Cont'd)

l. Improper installation of aids to navigation;

m. Negligent design and/or installation of the breakwall;

n. Failure to ensure that the aids to navigation were functioning properly, failure to correct defficiencies in the aids to navigation;

o. The aids to navigation were not adequately functioning or displaying their proper characteristics as indicated on navigational charts, light lists, etc., in that the fog horn was not working properly and the west light was not displaying the indicated flashing characteristics.

p. Any and all other forms of negligent conduct on the Defendants' part to be proven at the trial of this cause.

Lawson could not see the navigational lights on the breakwall and became confused and disoriented. (Lawson Aff.) The weather was clear and calm. Lawson attempted to manuever the boat into a westerly direction to avoid the breakwall. Just as he began to turn the vessel to the west, the boat allided with the breakwall, near its middle. There were no lights or other navigational aids at this location. (*Id.* ¶4)

Plaintiffs allege, *inter alia,* that defendant was negligent because it did not adequately design or install the breakwall; did not use the correct type and number of navigational aids to mark the breakwall; and improperly positioned the navigational aids. Plaintiffs further allege that the relevant aids to navigation which were placed on the breakwall (the westerly light and the fog horn) were not working properly (amended complaint, ¶¶14, 19 and 20).

The discretionary function exception relied on by the United States is set forth in 28 U.S.C. §2680(a) which states:

> The provisions of this chapter [Tort Claims Procedure against the United States] and section 1346(b) [Federal Tort Claims Act] . . . shall not apply to —
>
> > (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, based upon the exercise or performance or the failure to exercise or perform a discretionary

> function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The exception also applies to actions under the SAA, such as plaintiffs' action herein. See, *inter alia, Graves v. U.S.*, 872 F.2d 113 (6th Cir. 1989); *In re Ohio River Disaster Litigation*, 862 F.2d 1237 (6th Cir. 1988), *cert. denied*, 110 S.Ct. 59 (1989); *Bearce v. U.S.*, 614 F.2d 556 (7th Cir. 1980), *cert. denied*, 449 U.S. 837 (1980); *Gercey v. U.S.*, 540 F.2d 536 (1st Cir. 1976), *cert. denied*, 430 U.S. 954 (1977).

The exception was recently revisited in *United States v. Gaubert*, __ U.S. __, 111 S.Ct. 1267, 1273 (1991), which noted it "covers only acts that are discretionary in nature, acts that 'invlove an element of judgment or choice' " (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). *Gaubert* further described the discretionary function exception as follows:

> . . . if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that

> a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations. *Gaubert* at 1274. (Citations omitted.)

Congress has given the Coast Guard, as representative of the United States, discretionary authority to establish aids to navigation, see 14 U.S.C. section 81 and 86; *Bearce, supra*; *Corporacion Insular de Seguros v. U.S.*, 646 F.Supp. 1230 (D. Puerto Rico 1986). 14 U.S.C. §81 provides in pertinent part:

> In order to aid navigation and to prevent disasters, collisions, and wrecks of vessels and aircraft, the Coast Guard may establish, maintain, and operate:
>
> > (1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States.

14 U.S.C. §86 empowers the Coast Guard, to "mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters . . . in such manner and for so long as, in his judgment, the needs of maritime navigation require."

Gaubert notes that "[d]iscretionary conduct is not confined to the policy or planning level." A discretionary act is "one that involves choice or judgment" at the policy, planning or operational level. *Id.* at 1275; see also, *Tracor/MBA Inc. v. United States*, 933 F.2d 663, 667 (8th Cir. 1991).

Appendix E

Generally, the Coast Guard has no duty to establish aids to navigation and cannot be held liable for failure to do so. *Corporacion, supra*; *Bearce, supra*; *Chute v. United States*, 610 F.2d 7 (1st Cir. 1979), *cert. denied*, 446 U.S. 936 (1980). The decision whether to mark a known obstruction, such as a breakwall, and what type of marking to use, is a discretionary function, outside the purview of the SAA and the FTCA, *Corporacion, supra* at 1234, as are the design and installation of the breakwall. *Indian Towing Co., Inc. v. United States*, 350 U.S. 61 (1955).

However, the exception is not unlimited. Once the Coast Guard exercises its discretion and decides to operate navigational aids, it is obligated to use due care to make certain they are kept in good working order. *Id.* at 69 (operation of a light house). Thus, plaintiffs' allegations in subparagraphs 20(n) and 20(o) of the amended complaint that, as a result of the Coast Guard's negligence, neither the fog horn nor the westerly light on the breakwall was working properly, are not covered by the discretionary function exception. The United States concedes that once it exercised its discretion to place aids to navigation on the breakwall, it is liable if those aids were negligently maintained or operated, thus does not seek to dismiss subparagraphs 20(n) and (o) .

The remaining claims of negligence in the amended complaint, see subparagraphs 20(a) through (m) and (p), allege negligence, *inter alia*, in the design and installation of the breakwall and in the selection of the number, type and location of navigational aids. Plaintiffs cite *Eklof Marine Corp. v. United States*, 762 F.2d 200 (2d Cir. 1985) to support their contention that the discretionary function exception does not apply to these other claims of negligence. *Eklof* found the United States

(through actions of the Coast Guard) liable for the negligent positioning of a buoy to mark a reef. The court held the Coast Guard had the obligation to act "with due care to prevent a navigational aid from becoming a 'trap for . . . the unwary rather than a warning of danger.' " *Id., supra* at 203, citation omitted.

Eklof is not applicable to the case *sub judice.* The facts therein came under 14 U.S.C. §81, but not under 14 U.S.C. §86. *Eklof* viewed this as significant in view of the fact section 86 (but not section 81) provides that the Secretary may mark obstructions "in such manner and for so long as, *in his judgment,* the needs of maritime navigation require." (Emphasis added.) *Eklof* emphasized that corresponding language is not found in section 81. *Id.* at 204. Unlike the placement of a buoy, such as in *Eklof,* the marking of a breakwall, such as in the case herein, is covered by both section 81 and section 86. *Corporacion Insular de Seguros, supra.* Thus, marking the breakwall is to be done in a manner which "in his judgment" (the judgment of the Secretary through the Coast Guard) meets the needs of maritime navigation. Use of judgment invokes the discretionary function exception.

Eklof also found that the action of the Coast Guard therein was an "operational" function, as opposed to a "planning" function, and implied that operational functions are not covered by the discretionary function exception. *Id.* at p.205. *Gaubert, supra,* subsequently held that discretionary conduct which comes under the exception includes discretionary action taken at the operational level. *Id.* at 1275.

The precedent closest on its facts to this case is *Corporacion Insular, supra,* in which a pleasure boat collided with a breakwall maintained by the Coast Guard. Plaintiffs therein contended the

collision was caused by Coast Guard negligence in failing to adequately mark, illuminate or otherwise advise the navigating public of the breakwall and incorrectly showing the location of red warning lights posted on the pier adjacent to the breakwall. The court held that the discretionary function exception applied, thus the United States was not liable. It noted that judicial review of the decision of the Coast Guard to mark an obstruction, and the type of warning or marking to be used, "must be very limited. To allow otherwise would constitute an impermissible interference with the government's exercise of discretion in a policy-making capacity, as 'how much equipment the Coast Guard is to possess, and how much money it is to spend, measure, necessarily, by Congressional appropriations, must be for the government's uncontrolled discretion.' " *Id.* at pp.1234-35.

The above considerations apply here, as reflected in the following. The breakwall at issue was built during 1964-65 pursuant to design and construction plans authorized and approved by the office of the Chief of Engineers, Washington, D.C., in February 1962 and June 1963. (See affidavit of James Brade, civil engineer, U.S. Army Corps of Engineers, attached to defendant's motion to dismiss.) According to Coast Guard policy, "aids to navigation, such as breakwall lights, are provided only where they are most needed, subject to available funds, and then, only to mark channels and some unusual danger to navigation. Consideration of these factors is left to the discretion of the Aids to Navigation Branch for the District Command in which one waterway exists." (Affidavit of William Craig, Chief of the Planning Section, Aids to Navigation Branch, Coast Guard, at p.3.) See also *Bearce, supra*, (exception applies to an accident in which a speedboat struck an unmarked, unlit breakwall in the Chicago harbor on Lake Michigan).

Appendix E

To summarize, the discretionary function exception applies to all, or most, claims of negligence made by plaintiffs, with the exception of those in subparagraphs 20 (n) and (o) which allege the negligent failure of the Coast Guard to properly maintain the relevant aids to navigation, *i.e.*, the fog horn and the westerly light. There is some arguable overlap between subparagraphs 20(n) and 20(o) and a few of the other subparagraphs (see, for example, subparagraphs 20(h) and 20(j)). Insofar as these other subparagraphs allege negligence in the operation and maintenance of the fog horn and westerly light, they do not come within the exception.

RECOMMENDATION

It is recommended that the motion of the United States to dismiss the negligence allegations in the amended complaint against it be granted, with the exception of: (1) the allegations of negligence set forth in subparagraphs 20(n) and 20(o); and (2) any portion of the other subparagraphs in paragraph 20 which allege negligent maintenance or operation of the fog horn and westerly light.

Dated: NOV 26 1991

s/ Jack B. Streepy
Jack B. Streepy
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the District Court's order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

APPENDIX F — RELEVANT STATUTES AND REGULATIONS

46 U.S.C.

§ 742. Libel in personam

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 1 of this Act [46 USCS Appx § 741]. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed

by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

28 U.S.C.

§ 2680. Exceptions

The provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the

Appendix F

United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

(June 25, 1948, ch 646, § 1, 62 Stat. 984; July 16, 1949, ch 340, 63 Stat. 444; Sept. 26, 1950, ch 1049, §§ 2(a)(2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, P. L. 86-168, Title II, § 202(b), 73 Stat. 389; Mar. 16, 1974, P. L. 93-253, § 2, 88 Stat. 50.)

Appendix F

CHAPTER 19A. ADMIRALTY AND MARITIME JURISDICTION

46 U.S.C.

§ 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act [46 USCS Appx. §§ 781 et seq.] or Suits in Admiralty Act [46 USCS Appx. §§ 741 et seq.], as appropriate, shall constitute the exclusive remedy for all causes of action arising after the date of the passage of this Act [enacted June 19, 1948] and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, That no suit shall be

filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

TITLE 14 — COAST GUARD

§ 2. Primary duties

The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and water subject to the jurisdiction of the United States; shall engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, icebreaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States, shall, pursuant to international agreements, develop, establish, maintain, and

operate icebreaking facilities on, under, and over waters other than the high seas and waters subject to the jurisdiction of the United States; shall engage in oceanographic research on the high seas and in waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war, including the fulfillment of Maritime Defense Zone command responsibilites[.].

(As amended Nov. 10, 1986, P. L. 99-640, § 6, 100 Stat. 3547; Sept. 28, 1988, P. L. 100-448, § 17, 102 Stat. 1845; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle L, § 7403, 102 Stat. 4484.)

§ 2. Primary duties

The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on and under the high seas and waters subject to the jurisdiction of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, icebreaking facilities, and rescue facilities for

the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall, pursuant to international agreements, develop, establish, maintain, and operate icebreaking facilities on, under, and over waters other than the high seas and waters subject to the jurisdiction of the United States; shall engage in oceanographic research on the high seas and in waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war.

(Aug. 4, 1949, c. 393, § 1, 63 Stat. 496; Oct. 5, 1961, P. L. 87-396, § 1 in part, 75 Stat. 827; June 12, 1970, P. L. 91-278, § 1(1), 84 Stat. 304; Dec. 13, 1974, P. L. 93-519, 88 Stat. 1659.)

14 U.S.C.

§ 81. Aids to navigation authorized

In order to aid navigation and to prevent disasters, collisions, and wrecks of vessels and aircraft, the Coast Guard may establish, maintain, and operate:

(1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States;

(2) aids to air navigation required to serve the needs of the armed forces of the United States peculiar to warfare and primarily of military concern as determined by the Secretary of Defense or the Secretary of any department within the Department of Defense and as requested by any of those officials; and

(3) electronic aids to navigation systems (a) required to serve the needs of the armed forces of the United States peculiar to warfare and primarily of military concern as determined by the Secretary of Defense or any department within the Department of Defense; or (b) required to serve the needs of the maritime commerce of the United States; or (c) required to serve the needs of the air commerce of the United States as requested by the Administrator of the Federal Aviation Administration.

These aids to navigation other than electronic aids to navigation systems shall be established and operated only within the United States, the waters above the Continental Shelf, the territories and possessions of the United States, the Trust

Territory of the Pacific Islands, and beyond the territorial jurisdiction of the United States at places where naval or military bases of the United States are or may be located.

§ 83. Unauthorized aids to maritime navigation; penalty

No person, or public body, or instrumentality, excluding the armed services, shall establish, erect, or maintain any aid to maritime navigation in or adjacent to the waters subject to the jurisdiction of the United States, its territories or possessions, or the Trust Territory of the Pacific Islands, or on the high seas if that person, or public body, or instrumentality is subject to the jurisdiction of the United States, without first obtaining authority to do so from the Coast Guard in accordance with applicable regulations. Whoever violates the provisions of this section or of any of the regulations issued by the Secretary in accordance herewith shall be guilty of a misdemeanor and shall be fined not more than $100 for each offense. Each day during which such violation continues shall be considered as a new offense.

§ 85. Aids to maritime navigation; penalty

The Secretary shall prescribe and enforce necessary and reasonable rules and regulations, for the protection of maritime navigation, relative to the establishment,

maintenance, and operation of lights and other signals on fixed and floating structures in or over waters subject to the jurisdiction of the United States and in the high seas for structures owned or operated by persons subject to the jurisdiction of the United States. Any owner or operator of such a structure, excluding an agency of the United States, who violates any of the rules or regulations prescribed hereunder, commits a misdemeanor and shall be punished, upon conviction thereof, by a fine of not exceeding $100 for each day during which such violation continues.

§ 86. Marking of obstructions

The Secretary may mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters or waters above the continental shelf of the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require. The owner of such an obstruction shall be liable to the United States for the cost of such marking until such time as the obstruction is removed or its abandonment legally established or until such earlier time as the Secretary may determine. All moneys received by the United States from the owners of obstructions, in accordance with this section, shall be covered into the Treasury of the United States as

miscellaneous receipts. This section shall not be construed so as to relieve the owner of any such obstruction from the duty and responsibility suitably to mark the same and remove it as required by law.

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SUBCHAPTER C — AIDS TO NAVIGATION

Subpart A — General

§ 62.1 Purpose

(a) The Coast Guard administers the U.S. Aids to Navigation System. The system consists of Federal aids to navigation operated by the Coast Guard, aids to navigation operated by the other armed services, and private aids to navigation operated by other persons.

* * *

(c) The Coast Guard maintains systems of marine aids to navigation consisting of visual, audible, and the electronic signals which are designed to assist the prudent mariner in the process of navigation. The aids to navigation system is not intended to identify every shoal or obstruction to navigation which exists in the navigable waters of the United States, but rather provides for reasonable marking of marine

features as resources permit. The primary objective of the aids to navigation system is to mark navigable channels and waterways, obstructions adjacent to these waterways, and obstructions in areas of general navigation which may not be anticipated. Other waters, even if navigable, are generally not marked.

* * *

§ 62.45 Light characteristics.

(a) Lights on aids to navigation are differentiated by color and rhythm. Lighthouses and range lights may display distinctive light characteristics to facilitate recognition. No special significance should be attached to the color or rhythm of such lights. Other lighted aids to navigation employ light characteristics to convey additional information.

* * *

(c) Yellow lights have no lateral significance. Except on the Western Rivers, see § 62.51, white lights have no lateral significance. The purpose of aids exhibiting white or yellow lights may be determined by their shape, color, letters or numbers, and the light rhythm employed.

* * *

Appendix F

PART 66 — PRIVATE AIDS TO NAVIGATION

Subpart 66.01 — Aids to Navigation Other Than Federal or State

* * *

§ 66.01-1 Basic provisions.

(a) No person, public body or instrumentality not under the control of the Commandant, exclusive of the Armed Forces, shall establish and maintain, discontinue, change or transfer ownership of any aid to maritime navigation without first obtaining permission to do so from the Commandant.

(b) For the purposes of this subpart, the term private aids to navigation includes all marine aids to navigation operated in the navigable waters of the United States other than those operated by the Federal Government (part 62 of this subchapter) or those operated in State waters for private aids to navigation (subpart 66.05).

(c) Coast Guard authorization of a private aid to navigation does not authorize any invasion of private rights, nor grant any exclusive privileges, nor does it obviate the necessity of complying with any other Federal, State or local laws or regulations.

(d) With the exception of radar beacons (racons) and shore based radar stations, operation of electronic aids to navigation as private aids will not be authorized.

* * *

§ 66.01-10 Characteristics.

(a) The characteristics of a private aid to navigation shall conform to the United States Aids to Navigation System described in Subpart B of Part 62 of this subchapter, except that only tungsten-incandescent light sources will be approved for electric lights.

* * *

§ 66.01-15 Action by Coast Guard.

(a) The District Commander receiving the application will review it for completeness and will assign the aid one of the following classifications:

Class I: Aids to navigation on marine structures or other works which the owners are legally obligated to establish, maintain and operate as prescribed by the Coast Guard.

Class II: Aids to navigation exclusive of Class I located in waters used by general navigation.

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Class III: Aids to navigation exclusive of Class I located in waters not ordinarily used by general navigation.

* * *

§ 66.01-20 Inspection

All classes of private aids to navigation shall be maintained in proper operating condition. They are subject to inspection by the Coast Guard at any time and without prior notice.

§ 66.01-30 Corps of Engineers' approval.

(a) Before any private aid to navigation consisting of a fixed structure is placed in the navigable waters of the United States, authorization to erect such structure shall first be obtained from the District Engineer, U.S. Army Corps of Engineers in whose district aid will be located.

(b) The application to establish any private aid to navigation consisting of a fixed structure shall show evidence of the required permit having been issued by the Corps of Engineers.

§ 66.01-50 Protection of private aids to navigation.

Private aids to navigation lawfully

maintained under these regulations are entitled to the same protection against interference or obstruction as is afforded by law to Coast Guard aids to navigation (Part 70 of this subchapter). If interference or obstruction occurs, a prompt report containing all the evidence available should be made to the Commander of the Coast Guard District in which the aids are located.

* * *

Subpart 66.05 — State Aids to Navigation

* * *

§ 66.05-1 Purpose.

(a) The purpose of the regulations in this subpart and subpart 66.10 of this part is to prescribe the conditions under which State governments may regulate aids to marine navigation, including regulatory markers, owned by State or local governments or private parties, in navigable waters of the United States not marked with aids by the Federal Government; and to prescribe a uniform system of marine aids to navigation compatible with the United States Aids to Navigation System described in Part 62 of this subchapter.

* * *

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§ 66.05-5 Definition of terms used in this subpart and Subpart 66.10.

(a) The term *State waters for private aids to navigation* means those navigable waters of the United States which the Commandant, upon request of a State Administrator, has designated as waters within which a State government may regulate the establishment, operation, and maintenance of marine aids to navigation, including regulatory markers. The Commandant will entertain requests to make such designations with respect to navigable waters of the United States not marked by the Federal government. These designations when approved will be set forth in separate sections by States in this subpart and will briefly describe or identify waters so designated.

(b) The term *Uniform State Waterway Marking System* (USWMS) means the system of private aids to navigation, including regulatory markers, which may be operated in State waters for private aids to navigation. Subpart 66.10 of this part describes the Uniform State Waterway Marking System.

* * *

(d) The term *State aids to navigation* means all private marine aids to navigation

operated in State waters for private aids to navigation, whether owned by a State, political subdivisions thereof or by individuals, corporations, or organizations.

(e) The term *regulate State maritime aids to navigation* means to control the establishment, disestablishment, operation and maintenance of State aids to navigation.

§ 66.05-35 Private aids to navigation other than State owned.

(a) No person, public body or other instrumentality not under control of the Commandant or the State Administrator, exclusive of the Armed Forces of the United States, shall establish, erect or maintain in State waters for private aids to navigation any aid to navigation without first obtaining permission to do so from the State Administrator. Discontinuance of any State aids to navigation may be effected by order of the State Administrator.

§ 66.05-40 Corps of Engineers' approval.

(a) In each instance where a regulatory marker is to be established in navigable waters of the United States which have been designated by the Commandant as State waters for private aids to navigation, the State Administrator is responsible for obtaining prior permission from the District Engineer,

U.S. Army Corps of Engineers concerned, authorizing the State to regulate the water area involved, or a statement that there is no objection to the proposed regulation of the water area. A copy of the Corps of Engineers permit or letter of authority shall be provided by the Administrator to the District Commander upon request.

(b) Similarly, where an aid to navigation is to be placed on a fixed structure or a mooring buoy is to be established in State waters for private aids to navigation, the State Administrator shall assure that prior permission or a statement of no objection to the structures or mooring buoys proposed is obtained from the District Engineer concerned. A copy of the permit or letter is not required by the District Commander.

PART 67 — AIDS TO NAVIGATION ON ARTIFICIAL ISLANDS AND FIXED STRUCTURES

* * *

§ 67.01-1 Scope

(a) The regulations in this part prescribed the obstruction lights and fog signals to be operated as privately maintained maritime aids to navigation on the artificial islands and structures which are erected on or over the seabed and subsoil of the Outer Continental

Shelf and in the waters under the jurisdiction of the United States, for the purpose of exploring for, developing, removing and transporting resources therefrom.

(b) Subpart 66.01 in Part 66 of this subchapter shall be applicable to all private aids to navigation erected on or over the Outer Continental Shelf in the same manner and to the same extent as they are applicable to private . . .

* * *

§ 67.01-5 Definitions.

(a) *Structures.* The term "structures" as used in this part shall include all fixed structures, temporary or permanent, for which a Corps of Engineers' permit is issued. It shall include, but is not necessarily limited to, all drilling platforms, production platforms, quarters platforms, pipe line riser platforms, manifold platforms, loading platforms, boat landings, caissons, well protective structures, tank battery barges submerged on station, drilling barges submerged on location, break-water barges submerged on location, artificial islands and all other piles, pile clusters, pipes, or structures erected in the waters.

* * *

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Subpart 67.05 — General Requirements for Lights

§ 67.05-1 Arrangement of obstruction lights.

* * *

(f) All obstruction lights shall be installed in a manner which will permit at least one of them to be carried in sight of the mariner, regardless of the angle of approach, until he is within 50 feet of the structure, visibility permitting.

§ 67.05-5 Multiple obstruction lights.

When more than one obstruction light is required by this part to mark a structure, all such lights shall be operated to flash in unison.

§ 67.05-20 Minimum lighting requirements.

The obstruction lighting requirements prescribed in this part are the minimum requirements only and shall not preclude the maintainer from making application for authorization to establish more lights, or lights of greater intensity than required to be visible at the distances prescribed: *Provided,* That the prescribed characteristics of color and flash duration are adhered to.

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LORAIN PORT AUTHORITY
CHAPTER 187
Wharves and Docks

187.01 CONSTRUCTION, REPAIR BY OWNERS.

The docks and wharves on the waterfront of all lots and premises abutting upon the Lorain Harbor shall be built and constructed and thereafter maintained and kept in repair by the owners of such lots and premises. (Ord. § 248. Passed 3-19-62.)

187.02 COUNCIL TO ORDER REPAIRS ASSESSMENTS.

Whenever, in the opinion of Council, public necessity requires the building, rebuilding or repairing of any dock or wharf along any such waterfront in the Lorain Harbor and upon any lot or premises abutting such water, they shall so declare by resolution and shall order the same to be built, rebuilt or repaired.

Such resolution shall state within what time after service of a copy of such resolution, as herein provided, such work shall be completed, and it shall order the owner or part owner of such lots or premises to build, rebuild or repair such dock or wharf within the time specified. The resolution shall further specify that if the owner or part owner

does not build, rebuild or repair such dock or wharf within the time specified, the City Engineer will cause such work to be done and the expense thereof shall be charged to such owner or part owner and shall also be assessed upon such lot or premises adjacent to and abutting upon such waterfront and upon which such work was done. Such resolution may be substantially as follows:

"Resolved that the public necessity requires the building (rebuilding or repairing) of the wharf on . . . waterfront upon the following described premises in the City of Lorain . . . and the same is hereby ordered to be built (rebuilt or repaired) within . . . days after service of certified copy of this resolution.

"Resolved further that the owner of such lot or premises is required to do such work within the time above specified and if such owner does not so perform such work within the time specified, then the City Engineer is hereby ordered and directed to cause such work to be done and the expense thereof shall be charged to such owner or part owner and shall be assessed upon such lot or premises."

(Ord. 8248. Passed 3-19-62.)

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LORAIN PORT AUTHORITY
CHAPTER 185
HARBOR AND LAKE REGULATIONS

185.24 DESTRUCTION OR DAMAGE TO NAVIGATIONAL AIDS.

No person shall purposely sever the mooring ties, set adrift, injure or damage in any manner any watercraft which is moored, docked, buoyed or tied up on the waters of the harbor, or purposely alter, injure, damage or destroy any buoys, markers, aids or lights necessary for the safe operation of watercraft upon the waters of the harbor.

(Ord. 8248. Passed 3-19-62.)

OHIO REVISED CODE
[LAKE ERIE WATERS AND SOILS]

§ 721.04 Use and control of waters and soil of Lake Erie.

Any municipal corporations within the limits of which there is included a part of the shore of the waters of Lake Erie may, in aid of navigation and water commerce, construct, maintain, use, and operate, piers, docks, wharves, and connecting ways, places, tracks, and other water terminal improvements with buildings and appurtenances necessary or incidental to such use, on any land belonging to the municipal

corporation held under title permitting such use, and also over and on any submerged or artificially filled land made by accretion resulting from artificial encroachments, title to which is in the state, within the territory covered or formerly covered by the waters of Lake Erie in front of littoral land within the limits of such municipal corporation, whether such littoral land is privately owned or not.

Any such municipal corporation may, be ordinance, subject to federal legislation, establish harbor lines and other regulations for such territory and prohibit the placing, maintaining, or causing or permitting to be placed therein any unlawful encroachments on such territory.

The territory to which this section applies is limited to that within the limits of the municipal corporation and extending into Lake Erie to the distance of two miles from the natural shore line. For all purposes of government and exercise of such powers the limits of any such municipal corporation shall be held to extend out, in, over, and under such water and land made or that may be made within such territory. This section does not limit the now existing boundaries of any municipal corporation. Where two municipal corporations have upland territory fronting on such waters, and there is a conflict

because of the curve of the shore line or otherwise as to such two mile boundary, the boundaries of each such municipal corporation may be determined by agreement between the municipal corporations concerned.

All powers granted by this section shall be exercised subject to the powers of the United States government and the public rights of navigation and fishery in any such territory. All mineral rights or other natural resources existing in the soil or waters in such territory, whether now covered by water or not, are reserved to the state.

OHIO REVISED CODE
CHAPTER 4582: PORT AUTHORITIES

§ 4582.01 Definitions.

As used in sections 4582.02 to 4582.20 of the Revised Code:

(A) "Port authority" means a port authority created pursuant to authority of section 4582.02 of the Revised Code.

(B) "Submerged lands" means the lands presently underlying the waters of Lake Erie or formerly underlying the waters of Lake Erie and now artificially filled between the natural shoreline and the harbor line or the

line of commercial navigation where no harbor line has been established.

(C) "Uplands" means lands contiguous to or fronting upon any submerged lands in this state.

(D) "Publication" means publication once a week on the same day of the week for three consecutive weeks in a newspaper of general circulation in the county or counties wherein such publication is required to be made. Publication shall be complete on the date of the last publication.

(E) "Aviation facilities" means aircraft and any facilities used, available for use, or designed for use for the safe navigation, landing or taking off of aircraft; for the safety, storage, maintenance and repair of aircraft; for the comfort and accommodations of the users of air transportation, including persons, cargo, mail, and other property, and for the safe and efficient operation and maintenance of airports and any care of such facilities.

(F) "Authorized purposes" or "purpose" means either of the following:

(1) Activities which increase, foster, aid, or promote air or water transportation, economic development, or residential facilities within the jurisdiction of the port authority;

(2) Activities consistent with Section 13 of Article VIII, Ohio Constitution.

(G) "Port authority facilities" means all real or personal property, or combination thereof, related to or used for any commercial, industrial, distribution, transportation, residential, recreational, educational, cultural, or research facility, including aviation facilities and waterport facilities.

(H) "Bonds" means bonds, notes, or other forms or evidences of obligation issued in temporary or definitive form, including notes issued in anticipation of the issuance of bonds and renewal notes.

§ 4582.22 Creation and powers of new port authority.

(A) Any municipal corporation, township, county, or any combination of a municipal corporation, municipal corporations, township, townships, county, or counties, no one of which has been included in a port authority in existence on December 16, 1964, may create a port authority. A municipal corporation shall act by ordinance, a township shall act by resolution of the township trustees, and a county shall act by resolution of the county commissioners, in authorizing the creation of a port authority. A port authority created pursuant to this

section is a body corporate and politic which may sue and be sued, plead and be impleaded, and has the powers and jurisdiction enumerated in sections 4582.21 to 4582.59 of the Revised Code. The exercise by such port authority of the powers conferred upon it shall be deemed to be essential governmental functions of this state, but no port authority is immune from liability by reason thereof.

(B) At the time a port authority is created pursuant to division (A) of section 4582.22 of the Revised Code or, in the case of a port authority in existence on the effective date of this section, at the time the subdivision or subdivisions which created such authority act pursuant to division (B) of section 4582.201 [4582.20.1] of the Revised Code, the subdivision or subdivisions which create the port authority may restrict the powers granted the port authority pursuant to this chapter by specifically setting forth such restructions in the resolution or ordinance creating the port authority or in the resolution ordinance adopted pursuant to division (B) of section 4582.201 [4582.20.1] of the Revised Code.

(C) The subdivision or subdivisions which created a port authority whose powers have been restricted pursuant to division (B) of this section may, at any time, adopt a resolution or ordinance to grant additional

powers, so long as the powers so granted do not exceed the powers permitted pursuant to this chapter.

§ 4582.30 Area of jurisdiction; municipal or county power to create new authority.

(A) Except as otherwise provided in division (B) of this section, the area of jurisdiction of a port authority created in accordance with section 4582.22 of the Revised Code shall include all of the territory of the political subdivision or subdivisions creating it and, if the port authority owns or leases a railroad line, the territory on which the railroad's line, terminals, and related facilities are located, regardless of whether the territory is located in the political subdivision or subdivisions creating the port authority, provided that in no case shall the same political subdivision that created or joined an existing port authority be included in more than one port authority.

(B)(1) A municipal corporation with a population of at least one hundred thousand according to the most recent federal decennial census may create a port authority within a county that previously created an existing port authority, if the municipal corporation did not join with the county in creating the port authority or thereafter join that port authority.

(2) A county may create a port authority the area of jurisdiction of which excludes any territory that is located in that county and is in the area of jurisdiction of any port authority created in accordance with section 4582.02 or 4582.22 of the Revised Code that is then existing in the county.

§ 2743.01 Definitions

As used in this chapter:

(A) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

(B) "Political subdivisions" means municipal corporations, townships, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.

(C) "Claim for an award of reparations" or "claim" means a claim for an award of reparations made under section 2743.51 to 2743.72 of the Revised Code.

(D) "Award of reparations" or "award" means an award made under sections 2743.51 to 2743.72 of the Revised Code.

§ 2743.02 Waiver of immunity of state; personal immunity not available to state; hospitals of political subdivisions; collateral recovery; indemnification of personnel; actions against state personnel; third-party complaints and counterclaims.

(A)(1) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in the case of state universities or colleges, in section 2345.40 of the Revised Code, and except as provided in division (A)(2) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act

or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(2) If a claimant proves in the court of claims that an officer or employee, as defined in section 109.36 of the Revised Code, would have personal liability for his acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2743.16 of the Revised Code and that is based upon the acts or omissions.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This division is also applicable to hospitals owned or operated by political subdivisions which have been determined by the supreme court to be subject to suit prior to July 28, 1975.

(C) Any hospital, as defined under

section 2305.11 of the Revised Code, may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees, and, whether or not such insurance is purchased, may, to such extent as its governing board considers appropriate, indemnity or agree to indemnify and hold harmless any such person against expense, including attorney's fees, damage, loss, or other liability arising out of, or claimed to have arisen out of, the death, disease, or injury of any person as a result of the negligence, malpractice, or other action or inaction of the indemnified person while acting within the scope of his duties or engaged in activities at the request or direction, or for the benefit, of the hospital. Any hospital electing to indemnify such persons, or to agree to so indemnify, shall reserve such funds as are necessary, in the exercise of sound and prudent actuarial judgment, to cover the potential expense, fees, damage, loss, or other liability. The superintendent of insurance may recommend, or, if such hospital requests him to do so, the superintendent shall recommend, a specific amount for any period that, in his opinion, represents such a judgment. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provision of division (B)(2) of that section apply under those circumstances.

(E) The only defendant in original actions in the court of claims is the state. The state may file a third-party complaint or counterclaim in any civil action, except a civil action for two thousand five hundred dollars or less, that is filed in the court of claims.

(F) A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner, shall first be filed against the state in the court of claims which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised

Code, and whether the courts of common pleas have jurisdiction over the civil action.

The filing of a claim against an officer or employee under this division tolls the running of the applicable statute of limitations until the court of claims determined whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

§ 2744.01 Definitions.

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of his employment for a political subdivision. "Employee" does not include an independent contractor, does not include any individual engaged by a school district pursuant to section 3319.301 [3319.30.1] of the Revised Code. "Employee" includes any

elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2151.355 [2151.35.5] of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not

specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(g) The construction, reconstruction, repair, renovation, maintenance, and

operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;

(h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;

(i) The enforcement or nonperformance of any law;

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

(k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under

section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement including, but not limited to, a sewer system;

(m) The operation of a human services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;

(n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;

(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(p) The provision of nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;

(q) Urban renewal projects and the elimination of slum conditions;

(r) Flood control measures;

(s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;

(t) The issuance of revenue obligations under section 140.06 of the Revised Code;

(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any park, playground, playfield, indoor recreational facility, zoo, zoological park, bath, or swimming pool or pond, and the operation and control of any golf course;

(v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120 of the Revised Code;

(w) A function that the general assembly mandates a political subdivision to perform.

(D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.

(E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created

pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 [713.23.1] of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 [307.05.2] of the Revised Code, a fire and ambulance district created pursuant to section 505.375 [505.37.5] of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, and county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 [343.01.2] of the Revised Code.

(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in

division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions.

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center,

exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. The following are full defenses to such liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct.

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while

engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to persons or property caused

by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, except that it is a full defense to such liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, officer buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised

Code. Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

§ 2744.02 Political subdivision not liable for injury, death, loss; exceptions

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss of persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil

action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. The following are full defense to such liability;

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct.

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or in answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Political subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance except that it is a full defense to such liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

§ 2744.03 Defenses or immunities of subdivision and employee.

(A) In a civil action brought against a political subdivision or an employee of a

political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary functions, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability, resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of his sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2151.355 [2151.35.5] of the Revised Code, and if, at the time of his injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to persons or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials,

personnel, facilities, and other resources, unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or section 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) His acts or omissions were manifestly outside the scope of his employment or official responsibilities;

(b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Liability is expressly imposed upon the employee by a section of the Revised Code.

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state, is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

§ 2744.09 Actions and claims exempted from provisions.

This chapter does not apply to, and shall not be construed to apply to, the following:

(A) Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability;

(B) Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;

(C) Civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment;

(D) Civil actions by sureties, and the rights of sureties, under fidelity or surety bonds;

(E) Civil claims based upon alleged violations of the constitution or statutes of the United States, except that the provisions of section 2744.07 of the Revised Code shall apply to such claims or related civil actions.

33 U.S.C.

CHAPTER 9. PROTECTION OF NAVIGABLE WATERS AND OF HARBOR AND RIVER IMPROVEMENTS GENERALLY

§ 401. Construction of bridges, cause was, dams, or dikes generally

It shall not be lawful to construct or commence the construction of any bridge, causeway, dam, or dike over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for (1) the bridge or causeway shall have been submitted to and approved by the Secretary of Transportation, or (2) the dam or dike shall have been submitted to and approved by the Chief of Engineers and Secretary of the Army. However, such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and

plans thereof are submitted to and approved by the Secretary of Transportation or by the Chief of Engineers and Secretary of the Army before construction is commenced. When plans for any bridge or other structure have been approved by the Secretary of Transportation or by the Chief of Engineers and Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless modification of said plans has previously been submitted to and received the approval of the Secretary of Transportation or the Chief of Engineers and the Secretary of the Army. The approval required by this section of the location and plans or any modification of plans of any bridge or causeway does not apply to any bridge or causeway over waters that are not subject to the ebb and flow of the tide and that are not used and are not susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.

(As amended Oct. 15, 1982, P. L. 97-322, Title I, § 401(b), 96 Stat. 1582; Jan. 12, 1983, P. L. 97-449, § 2(f), 96 Stat. 2440.)

§ 401. Construction of bridges, causeways, dams, or dikes generally

It shall not be lawful to construct or

commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War [Secretary of the Army]: Provided, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War [Army] before construction is commenced: And provided further, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War [Secretary of the Army], it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

(Mar. 3, 1899, ch 425, § 9, 30 Stat. 1151.)

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§ 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commerce the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army]; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army] prior to beginning the same.

§ 565. River and harbor improvement by private or municipal enterprise

Any person or persons, corporations, municipal or private, who desire to improve

any navigable river, or any part thereof, at their or its own expense and risk may do so upon the approval of the plans and specifications of said proposed improvement by the Secretary of War [Secretary of the Army] and Chief of Engineers of the Army. The plan of said improvement must conform with the general plan of the Government improvements, must not impede navigation, and no toll shall be imposed on account thereof, and said improvement shall at all times be under the control and supervision of the Secretary of War [Secretary of the Army] and Chief of Engineers.

33 U.S.C. § 1221

The Congress finds and declares —

(a) that navigation and vessel safety and protection of the marine environment are matters of major national importance;

(b) that increased vessel traffic in the Nation's ports and waterways creates substantial hazard to life, property, and the marine environment;

(c) that increased supervision of vessel and port operations is necessary in order to —

(1) reduce the possibility of vessel or cargo loss, or damage to life, property, or the marine environment;

(2) prevent damage to structures in, on, or immediately adjacent to the navigable waters of the United States or the resources within such waters;

(3) insure that vessels operating in the navigable waters of the United States shall comply with all applicable standards and requirements for vessel construction, equipment, manning, and operational procedures; and

(4) insure that the handling of dangerous articles and substances on the structures in, on, or immediately adjacent to the navigable waters of the United States is conducted in accordance with established standards and requirements; and

(d) that advance planning is critical in determining proper and adequate protective measures for the Nation's ports and waterways and the marine environment, with continuing consultation with other Federal agencies, State representatives, affected users, and the general public, in the development and implementation of such measures.

33 U.S.C. § 1225

(a) In general. The Secretary may take such action as is necessary to —

(1) prevent damage to, or the destruction of, any bridge or other structure on or in the navigable waters of the United States, or any land structure or shore area immediately adjacent to such waters; and

(2) protect the navigable waters and the resources therein from harm resulting from vessel or structure damage, destruction, or loss. Such action may include, but need to be limited to —

(A) establishing procedures, measures, and standards for the handling, loading, unloading, storage, stowage, and movement on the structure (including the emergency removal, control, and disposition) of explosives or other dangerous articles and substances, including oil or hazardous material as those terms are defined in section 4417a of the Revised Statutes, as amended [46 USCS § 2101];

(B) prescribing minimum safety equipment requirements for the structure to

assure adequate protection from fire, explosion, natural disaster, and other serious accidents or casualties;

(C) establishing water or waterfront safety zones, or other measures for limited, controlled, or conditional access and activity when necessary for the protection of any vessel, structure, waters, or shore area; and

(D) establishing procedures for examination to assure compliance with the requirements prescribed under this section.

(b) State law. Nothing contained in this section, with respect to structures, prohibits a State or political subdivision thereof from prescribing higher safety equipment requirements or safety standards than those which may be prescribed by regulations hereunder.

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43 U.S.C. § 1311

LANDS BENEATH NAVIGABLE WATERS WITHIN STATE BOUNDARIES

* * *

§ 1311. Rights of the States

(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use. It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) Release and relinquishment of title and claims of United States; payment to

States of moneys paid under leases. (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims of the United States, of any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on the effective date of this Act [enacted May 22, 1953], except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

(c) Leases in effect on June 5, 1950. The rights, powers, and titles hereby recognized, confirmed, established, and vested in and

assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: Provided, however, That, if oil or gas was not being produced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from the effective date hereof [enacted May 22, 1953] equal to the term remaining unexpired on December 11, 1950, under the provisions of such lease or any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued, such lease: Provided, however, That within ninety days from the effective date hereof [enacted May 22, 1953] (i) the lessee shall pay to the State or its grantee issuing such lease all rents, royalties, and other sums payable between June 5,

1950, and the effective date hereof [enacted May 22, 1953], under such lease and the laws of the State issuing or whose grantee issued such lease, except such rents, royalties, and other sums as have been paid to the State, its grantee, the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States and not refunded to the lessee; and (ii) the lessee shall file with the Secretary of the Interior or the Secretary of the Navy and with the State issuing or whose grantee issued such lease, instruments consenting to the payment by the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States to the State or its grantee issuing the lease, of all rents, royalties, and other payments under the control of the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States or the United States which have been paid, under the lease, except such rentals, royalties, and other payments as have also been paid by the lessee to the State or its grantee;

(d) Authority and rights of the United States respecting navigation, flood control and production of power. Nothing in this Act [43 USCS §§ 1301-1315] shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed

as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

(e) Ground and surface waters west of the 98th meridian. Nothing in this Act [43 USCS §§ 1301-1315] shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States.

28 U.S.C. § 1254

Cases in the courts of appeals my be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to

which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

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(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

28 U.S.C. § 1367

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental

jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for

any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

U.S. Const., Art. III, § 2, cl. 1

Section 2, Clause 1. Subject of jurisdiction.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different States, — between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Supreme Court, U.S.
FILED
DEC 19 1997
CLERK

No. 97-851

In The
Supreme Court of The United States
October Term 1997

DIANNA LAWSON, DAVID LAWSON,
MICHELLE LAWSON, AND JUSTIN LAWSON,
Petitioners,

v.

UNITED STATES OF AMERICA, CITY OF LORAIN,
OHIO AND LORAIN PORT AUTHORITY,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

JOINT RESPONSE OF CITY OF LORAIN AND LORAIN PORT AUTHORITY TO PETITION FOR WRIT OF CERTIORARI

***JOHN G. PETO**
BRIAN D. SULLIVAN
REMINGER & REMINGER CO., L.P.A.
The 113 St. Clair Building
Cleveland, OH 44114
(216) 687-1311

Attorneys for Respondent
Lorain Port Authority
**Counsel of Record*

***ROBERT J. GARGASZ**
MICHAEL J. SCHERACH
City of Lorain Law Dept.
City Hall, 7th Floor
Lorain, OH 44052
(440) 244-5663

Attorneys for Repondent
City of Lorain
**Counsel of Record*

LEGAL ADVANTAGE * 432 Walnut St. * Suite 200 * Cincinnati, OH 45202

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QUESTIONS PRESENTED FOR REVIEW RELATED TO RESPONDENTS, CITY OF LORAIN AND LORAIN PORT AUTHORITY

1. Whether the City of Lorain or the Lorain Port Authority have a duty under state law to petition the United States Coast Guard, the entity with exclusive authority and control over a structure within navigable waters, for permission to place additional navigational aids on a structure that was already marked in accordance with federal rules and regulations.

2. Whether additional navigational aids beyond those installed and maintained by the United States Coast Guard would have prevented the allision when the Petitioner, David Lawson, operated a motorboat in an intoxicated state, at an excessive rate of speed, and without a proper lookout.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners/Plaintiffs Below:

Petitioner David Lawson was the operator of the motorboat at the time of the allision. Petitioner Dianna Lawson is the wife of David Lawson and was a passenger at the time of the allision. Petitioners Michelle Lawson and Justin Lawson are the natural children of David and Dianna Lawson and at all relevant times were minors.

Respondents/Defendants Below:

Respondent United States of America is a sovereign nation. Respondent City of Lorain, Ohio is a municipality which is incorporated as such under the laws of the State of Ohio. Respondent Lorain Port Authority is a port authority which was established under the laws of the State of Ohio.

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STATEMENT OF THE CASE

A. Underlying Facts

This lawsuit arises out of injuries allegedly sustained as a result of an allision of a motorboat with the outer breakwall of the Lorain Harbor in Lorain, Ohio. At the time of the allision, the operator of the motorboat, David Lawson, was intoxicated. In fact, Mr. Lawson was convicted of operating the motorboat recklessly, at an excessive rate of speed, and without a proper lookout.

The breakwall which the Petitioners struck was in existence at the same location since the 1960's. The United States Army Corp of Engineers and the United States Coast Guard handled all aspects of the design, construction, and maintenance of the wall. The breakwall was marked by navigational aids (lights) at either end of it. The United States Coast Guard installed, maintained, and inspected the lights. The lights were operating properly on the night of the allision.

Neither the City of Lorain ("City") nor the Lorain Port Authority ("Port") owned, controlled, or maintained the outer breakwall of the Lorain Harbor. Moreover, neither the City nor the Port maintained, inspected and/or tested the navigational aids located on the wall. In fact, the real

property (submerged lands) upon which the outer breakwall rests is owned by the State of Ohio. The State of Ohio was never a party to this action.

B. Issues in Litigation

The Petitioners have argued that both the City and the Port have the ability to petition the Coast Guard for permission to place additional navigational aids on the breakwall. They have asserted that, because the City and the Port have the ability to request additional navigational aids, they also have a corresponding duty to undertake such a task. Finally, they have argued that, had the City or the Port requested that additional navigational aids be placed on the breakwal, the Coast Guard would have honored the request and he additional lights would have prevented the allision.

The City and the Port are statutorily precluded from taking any unilateral steps to establish, erect, or maintain any aid to navigation in or adjacent to the waters subject to the jurisdiction of the United States. Indeed, any public body which unilaterally undertakes such action is guilty of a misdemeanor. See 14 U.S.C. Section 83.

C. Proceedings Below

Throughout this litigation, the City and the Port denied that they had a legal duty to request the placement of additional lights on the breakwall. The District Court agreed and concluded that, inasmuch as neither the City nor the Port possessed or exercised control or authority over the breakwall, they did not have a legal duty, under state law, to request the placement of additional navigational aids on it. As such, the District Court granted the City and the Port summary judgment.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's determination. The Sixth Circuit concluded that neither the City nor the Port had a legal duty or even an absolute right to add lights to the breakwall and, as such, could not be held liable for the Petitioners' injuries.

SUMMARY OF ARGUMENT

The Sixth Circuit Court of Appeals and the District Court properly concluded that neither the City nor the Port owed the Petitioners any duty to petition the United States Coast Guard to place additional navigational aids on the Lorain Harbor outer breakwall. The structure was adequately marked by the Coast Guard pursuant to federal

rules and regulations. Additionally, neither the City nor the Port maintained, inspected, or controlled the structure. As such, the judgment of the lower courts was proper and further review is not warranted.

ARGUMENT OPPOSING CERTIORARI

The Petitioners are attempting to have this Court define the scope and extent of a duty that is a creature of state law. As previously indicated, they have argued that the City and the Port had a duty to request that additional navigational aids be placed on the Lorain breakwall. Ohio law, however, does not impose any such duty.

The State of Ohio has ownership and ultimate legal responsibility, subject to the paramount control of the United States, over land under Lake Erie. State ex rel. Squire v. City of Cleveland, 150 Ohio St. 303 (1948). Ohio's ownership and responsibility extends to the land upon which the outer breakwall is located. Pursuant to Ohio Revised Code Section 741.04, the state has transferred some of its responsibility to shoreline municipalities. The transfer of authority, however, does not include responsibility for seeking permission from the Coast Guard to place additional aids to navigation on the breakwall.

Moreover, federal law prohibits the City and the Port from taking any unilateral actions to place additional navigational aids on the breakwall. Indeed, 14 U.S.C. Section 83 makes it a misdemeanor for municipalities to erect a navigational aid without Coast Guard approval:

> No person, or public body, or instrumentality * * * shall establish, erect, or maintain any aid to maritime navigation in or adjacent to the waters subject to the jurisdiction of the United States * * * without first obtaining authority to do so from the Coast Guard in accordance with applicable regulations. Whoever violates the provisions of this section or of any of the regulations issued by the Secretary in accordance herewith shall be guilty of a misdemeanor and shall be fined * * *.

The Petitioners have argued that the City and the Port had a legal duty to ensure that additional navigational aids were placed on the breakwall. Presumably, the Petitioners would require the City and the Port to violate federal law to place what they believe are the necessary aids to maritime navigation. A legal duty, however, can not arise when such duty would need to be accomplished through the commission of a crime.

Additionally, the record is completely devoid of any evidence that demonstrates that, had the City or the Port petitioned the Coast Guard to place additional lights on the breakwall, the Coast Guard would have complied with the request and the additional navigational aids would have prevented the allision. To the contrary, the evidence presented to the District Court indicated that the operator of the motorboat was intoxicated at the time of the allision. Moreover, the operator was convicted of operating the motorboat at an excessive rate of speed, recklessly, and without a proper lookout. In light of these convictions, it is disingenuous to suggest that additional lights would have warned Mr. Lawson of the location of the breakwall.

Contrary to the Petitioners' argument, the decision of the United States Court of Appeals for the Sixth Circuit was proper and rooted in sound legal authority. The issues presented for review, as against the City and the Port, do not involve matters of great general interest or constitutional import. As such, it is respectfully requested that this Honorable Court deny the Petitioners' request for a writ of certiorari.

CONCLUSION

Wherefore, for the foregoing reasons, the City and the Port respectfully request that this Honorable Court deny the Petitioners request for a writ of certiorari.

Respectfully submitted,

JOHN G. PETO
Counsel of Record for
Lorain Port Authority
BRIAN D. SULLIVAN
REMINGER & REMINGER CO., L.P.A.
The 113 St. Clair Building
Cleveland, Ohio 44114
(216) 687-1311

ROBERT J. GARGASZ
Counsel of Record for
City of Lorain
Civil Assistant to the Law Director
MICHAEL J. SCHERACH
Law Director
City Hall, 7th Floor
Lorain, Ohio 44052
(440) 244-5663

APPENDIX

APPENDIX
A1

14 U.S.C. Section 83
Unauthorized aids to maritime navigation; penalty

No person, or public body, or instrumentality, excluding the armed services, shall establish, erect, or maintain any aid to maritime navigation in or adjacent to the waters subject to the jurisdiction of the United States, it territories or possessions, or the Trust Territory of the Pacific Islands, or on the high seas if that person, or public body, or instrumentality is subject to the jurisdiction of the United states, without first obtaining authority to do so from the Coast Guard in accordance with applicable regulations. Whoever violates the provisions of this section or any of the regulations issued by the Secretary in accordance herewith shall be guilty of a misdemeanor and shall be fined more than $100 for each offense. Each day during which such violation continues shall be considered as a new offense.

A2

OHIO REVISED CODE
[LAKE ERIE WATERS AND SOILS]

Section 721.04
Use and control of waters and soil of Lake Erie

Any municipal corporations within the limits of which there is included a part of the shore of the waters of Lake Erie may, in aid of navigation and water commerce, construct, maintain, use, and operate, piers, docks, wharves, and connecting ways, places, tracks, and other water terminal improvements with buildings and appurtenances necessary or incidental to such use, on any land belonging to the municipal corporation held under title permitting such use, and also over and on any submerged or artificially filled land made by accretion resulting from artificial encroachments, title to which is in the state, within the territory covered or formerly covered by the waters of Lake Erie in front of littoral land within the limits of such municipal corporation,

whether such littoral land is privately owned or not.

Any such municipal corporation may, be ordinance, subject to federal legislation, establish harbor lines and other regulations for such territory and prohibit the placing, maintaining, or causing or permitting to be placed therein any unlawful encroachments on such territory.

The territory to which this section applies is limited to that within the limits of the municipal corporation and extending into Lake erie to the distance of two miles from the natural shore line. For all purposes of government and exercise of such powers the limits of any such municipal corporation shall be held to be held to extend out, in, over, and under such water and land made or that may be made within such territory. This section does not limit the now existing boundaries of any municipal corporation. Where two municipal corporations have

upland territory fronting on such waters, and there is a conflict because of the curve of the shore line or otherwise as to such two mile boundary, the boundaries of each such municipal corporation may be determined by agreement between the municipal corporations concerned.

All powers granted by this section shall be exercised subject to the powers of the United States government and the public rights of navigation and fishery in any such territory. All mineral rights or other natural resources existing in the soil or waters in such territory, whether now covered by water or not, are reserved to the state.

Supreme Court, U.S.
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No. 97-851

In the Supreme Court of the United States

OCTOBER TERM, 1997

DIANNA LAWSON, ET VIR, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ROBERT S. GREENSPAN
RICHARD A. OLDERMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

13pp

QUESTIONS PRESENTED

1. Whether the Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*, constitutes a waiver of the United States' sovereign immunity for discretionary functions.

2. Whether the Coast Guard's selection of navigational aids for a breakwater is a discretionary function.

3. Whether the Coast Guard's authority over the breakwater at issue was exclusive, or was shared with local government.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the opinion of the court of appeals (Pet. App. 1a-13a) nor the opinion of the district court (Pet. App. 14a-24a) is reported. The two decisions of the magistrate judge (Pet. App. 26a-44a, 47a-57a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1997. The petition for a writ of certiorari was filed on November 21, 1997. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. At approximately 10 p.m. on a clear July night in 1990, petitioner David Lawson and his brother-in-law, Fred Rowe, left the dock at Lorain, Ohio, aboard Rowe's motorboat. The two men had spent the afternoon and evening at a friend's birthday party; they soon picked up David's wife Dianna Lawson, and Rowe's two-year-old daughter. The men then purchased beer, and headed for open water and a midnight ride on Lake Erie. Pet. App. 2a-3a.

To reach open water, the men had to maneuver around long cement breakwaters that flanked the entrance to Lorain Harbor. The last breakwater extended almost 2,150 feet along the coast and had navigation aids at either end—a sixty foot tower with a white rotating light on the breakwater's western end, and a 25 foot tower with a blinking yellow light on the eastern end. Although both lights were working, the boat crashed into the breakwater when the boat was about 540 feet from its east end. It is undisputed that David Lawson was piloting the boat at the time of the crash and that he had a blood alcohol level of .254 grams per deciliter, more than two and one half times the legal limit. Dianna Lawson was severely injured and was left a quadriplegic. Pet. App. 2a-3a.

2. Petitioners sued the United States under the Suits in Admiralty Act (SAA), 46 U.S.C. App. 741 *et seq.*, claiming that the Coast Guard had not properly marked the breakwater and that the existing light on the breakwater's west end was not in sound working order. They also sued the City of Lorain and the Lorain Port Authority (LPA), claiming that those

entities also failed to properly mark and maintain the breakwater. Pet. App. 4a.

The district court referred the case to a magistrate judge, who recommended a decision in favor of the United States on its motion to dismiss for lack of subject-matter jurisdiction. The magistrate judge concluded that petitioner's claims relating to the alleged failure of the Coast Guard to adequately design and install the breakwater, and its alleged failure to select the proper navigational aids, were barred by the discretionary function exception to liability. Pet. App. 48a-49a & n.1. With respect to the United States' subsequent motion for summary judgment on petitioners' claims that the Coast Guard had failed to properly maintain the navigational aids, which the court had held in an earlier ruling were not barred by the discretionary function exception, the magistrate judge determined that they lacked merit. The magistrate judge concluded that the breakwater's visual aids to navigation were adequately functioning at the time of the accident and that the only aid to navigation not functioning, a foghorn, would not have been used on the clear night of the accident. The magistrate judge also ruled that the Coast Guard had sole responsibility for the breakwater, and that neither the City of Lorain nor the LPA had a legal duty to control or maintain the structure. *Id.* at 35a. He thus recommended that the motions of the City and the LPA for summary judgment be granted. *Id.* at 38a.

The district court subsequently adopted the recommended decision of the magistrate judge, granting the United States' motion to dismiss on discretionary function grounds, and granting the motions for sum-

mary judgment filed by the United States, the City of Lorain, and the LPA. Pet. App. 14a-24a.

3. The court of appeals affirmed in a per curiam decision. Pet. App. 1a-13a. The court rejected petitioners' argument, made for the first time on appeal, that there is no discretionary function exception to liability under the Suits in Admiralty Act. The court concluded that "[e]xisting precedent in this circuit and most other circuits * * * has already decided this issue." *Id.* at 5a.

The court then ruled that the discretionary function exception clearly applied in this case. It noted that, under 14 U.S.C. 81, the Coast Guard "is not obligated to place lights at every coastal obstruction," but rather "may" establish aids to navigation. Pet. App. 6a. Moreover, "[b]ecause of the importance of navigational aids and the legal restrictions surrounding the placement of navigational aids," the court could "only conclude that the Coast Guard's authority over those aids is one of public policy." *Id.* at 7a. The court concluded that the decision to place only two navigational aids on the Lorain breakwater remained within the discretionary function exception, and it thus rejected petitioner's argument that the Coast Guard negligently failed to provide a sufficient number of navigational aids on the breakwater. *Id.* at 9a. The court also found no error in the factual determination by the district court that the navigational aids were working properly on the night of the accident. *Id.* at 11a. Finally, the court of appeals affirmed the district court's legal ruling that neither the City of Lorain nor the LPA had control over the breakwater or authority and responsibility for maintenance of the navigational aids. *Id.* at 11a-12a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Accordingly, the petition for a writ of certiorari should be denied.

1. Suits brought under the Federal Tort Claims Act (FTCA) are subject to an exception for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). Prior to the amendment of the Suits in Admiralty Act (SAA) in 1960 to include matters that did not involve government vessels or cargo but would be within the admiralty jurisdiction if private parties were involved, the discretionary function exception had regularly been applied in FTCA cases within the federal courts' admiralty jurisdiction. See, *e.g.*, *Westchester Fire Ins. Co.* v. *Farrell's Dock & Terminal Co.*, 152 F. Supp. 97, 98 (D. Mass. 1957); *Kline* v. *United States*, 113 F. Supp. 298, 300 (S.D. Tex. 1953). There is no basis for concluding that Congress intended to remove the discretionary function exception—and *sub silentio*, to subject the government to new tort liability—when it transferred certain maritime tort actions from the FTCA to the SAA in 1960. Indeed, the legislative history demonstrates that the amendment was intended only to remove the confusion concerning the respective jurisdictions of the federal district courts and the Court of Claims. See S. Rep. No. 1894, 86th Cong., 2d Sess. 6 (1960); see also *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 175 (1976) ("It

was the difficulty in determining the appropriate forum for a maritime claim against the United States that moved Congress to amend the Suits in Admiralty Act in 1960.").

Thus, although the SAA does not contain an express discretionary function exception, every circuit that has considered the question has concluded that the exception applies in suits brought under the Act.* As the Second Circuit has concluded, "[w]ere we to find the discretionary function exception not to be applicable to the SAA, we would subject 'all administrative and legislative decisions concerning the public interest in maritime matters . . . to independent judicial review in the not unlikely event that the implementation of those policy judgments were to cause private injuries * * *.' Such an outcome is intolerable under our constitutional system of separation of powers." *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989) (citations omitted).

Petitioners argue (Pet. 9-10) that the Fourth Circuit has held that the discretionary function exception does not apply to the SAA, and therefore is in

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* See *Chute* v. *United States*, 610 F.2d 7, 12-13 (1st Cir. 1979), cert. denied, 446 U.S. 936 (1980); *Sea-Land Service, Inc.* v. *United States*, 919 F.2d 888, 891 (3d Cir. 1990), cert. denied, 500 U.S. 941 (1991); *Wiggins* v. *United States*, 799 F.2d 962, 964 (5th Cir. 1986); *Gordon* v. *Lykes Bros. S.S. Inc.*, 835 F.2d 96, 98 (5th Cir.), cert. denied, 488 U.S. 825 (1988); *Gemp* v. *United States*, 684 F.2d 404, 408 (6th Cir. 1982); *Cassens* v. *St. Louis River Cruise Lines, Inc.*, 44 F.3d 508, 511 (7th Cir. 1995); *Earles* v. *United States*, 935 F.2d 1028, 1031-1032 (9th Cir. 1991); *United States Fire Ins. Co.* v. *United States*, 806 F.2d 1529, 1534-1535 (11th Cir. 1986); *Canadian Transp. Co.* v. *United States*, 663 F.2d 1081, 1085-1086 (D.C. Cir. 1980).

conflict with the other circuits. Although it is true that the Fourth Circuit at one time declined to follow the rule incorporating the discretionary function exception into the SAA, see *Lane* v. *United States*, 529 F.2d 175, 179 (4th Cir. 1975), the Fourth Circuit has subsequently upheld the application of the discretionary function under the SAA without reference to *Lane*. See, *e.g.*, *Faust* v. *South Carolina State Hwy. Dep't*, 721 F.2d 934, 938-939 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *Tiffany* v. *United States*, 931 F.2d 271, 277 (4th Cir. 1991), cert. denied, 502 U.S. 1030 (1992). Given the current unanimity of the circuits on this issue, and the correctness of the ruling here, review is not warranted.

2. Petitioners contend that the Coast Guard's decision to place only two warning lights on the breakwater was not the type of decision that falls within the discretionary function exception. See Pet. 13-14 (discussing *Eklof Marine Corp.* v. *United States*, 762 F.2d 200 (2d Cir. 1985), and *Sutton* v. *Earles*, 26 F.3d 903 (9th Cir. 1994)). Neither case is apposite. As the court of appeals correctly held, those cases "address situations in which the Coast Guard decided to install a single buoy to mark an underwater obstruction, but the buoy was either misplaced or not properly maintained." Pet. App. 8a. Here, the Coast Guard placed two navigational aids on the breakwater, both of which were properly maintained. Moreover, unlike *Eklof*, this case arises under 14 U.S.C. 86, which empowers the Coast Guard to "mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters * * * in such manner and for so long as, [in the Commandant's] judgment, the needs of maritime navigation require." The court in *Eklof* observed

that, if that case had arisen under 14 U.S.C. 86, application of the discretionary function exception would be mandated. 762 F.2d at 204. Because the Coast Guard is charged with making a judgment about the manner in which an obstruction is to be treated for the protection of navigation, the decision to mark the breakwater with two lights clearly comes within the discretionary function exception.

In any event, even if the discretionary function exception did not apply here, petitioners still could not prevail in this lawsuit because any breach of the government's duty was not the proximate cause of the injuries to Dianna Lawson. The record reflects that David Lawson was operating his motorboat recklessly, and that his blood alcohol level was more than two-and-one-half times the legal limit. Petitioner David Lawson's condition was thus the likely proximate cause of the accident.

3. Petitioners maintain (Pet. 24-28) that both lower courts erred in holding that the Coast Guard—and not the City of Lorain or the LPA—had sole responsibility for maintenance of the breakwater. However, under 14 U.S.C. 2 and 81, the Coast Guard has sole responsibility for the breakwater. As the court of appeals correctly observed, if the City of Lorain or the LPA had sought to interfere with that authority, they would have become potentially liable for criminal penalties under 14 U.S.C. 83, which provides that "[n]o person, or public body, or instrumentality, excluding the armed services, shall establish, erect, or maintain any aid to maritime navigation in or adjacent to the waters subject to the jurisdiction of the United States," without authority from the Coast Guard. No permission was sought from the Coast Guard here, and the maintenance of

the breakwater therefore remained solely a federal function.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ROBERT S. GREENSPAN
RICHARD A. OLDERMAN
Attorneys

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